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APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 29

UNITED STATES OF AMERICA, APPELLANT

v.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED FEBRUARY 12, 1968
PROBABLE JURISDICTION NOTED APRIL 1, 1968

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1102

UNITED STATES OF AMERICA, APPELLANT

v.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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Relevant Docket Entries

Date	Proceedings
Dec. 21, 1964	Filed Complaint and issued summons. (issued 3 summons)
Aug. 13, 1965	Filed Answer of deft. Tennessee Corp.
Aug. 13-65	Filed Answer of deft. Internat'l Minerals & Chemical Corp.
Aug. 16-65	Filed Answer of deft. Concentrated Phosphate Export Assoc.
Aug. 16-65	Filed Answer of deft. American Cyanamid Co.
Aug. 16-65	Filed Answer of deft. Socony Mobil Oil Co. Inc.
Aug. 24-65	Filed Answer of deft. W. R. Grace & Co.
August 23, 1966	Filed stip. & order—stipulation dated 8-22-66 with annexed stipulation of facts & exhibits dated 8-19-66 are accepted and approved as the sole & entire record upon which the Court's decision of this case be rendered. Plaintiff to file on or before 10-31-66 its brief—defts. to file brief by 1-16-67, etc. Ryan, J.
Oct. 31-66	Filed plaintiff's certificate of service of attached "Brief for the U.S."
Mar. 20, 1967	Before Ryan, J. Trial begun and concluded—non-jury. Decision reserved.
Sept. 11-67	Filed memorandum opinion #38995—we conclude that there is no violation of antitrust laws because the activities of defendants were immunized by the Webb-Pomerene Act—complaint is dismissed upon the merits and the clerk is directed to enter judgment of dismissal in favor of defendants—so ordered—Ryan, J.

Sept. 11-67	Filed order & judgment that defendants Concentrated Phosphate, American Cyanamid, Grace & Co., Int'l. Minerals, Tennessee Corp. & Socony Oil for judgment against plaintiff, dismissing the complaint—judgment entered—clerk.
Nov. 9-67	Filed plaintiff's notice of appeal to the Supreme Court of the U.S. & proof of service.
Jan. 19, 1968	Filed designation and certification of record on appeal to the Supreme Court of the U.S.

Filed: December 21, 1964

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil No. 64 Civil 3914

UNITED STATES OF AMERICA, Plaintiff

v.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., AMERICAN CYANAMID COMPANY, W. R. GRACE & CO., INTERNATIONAL MINERALS & CHEMICAL CORPORATION, TENNESSEE CORPORATION and SOCONY MOBIL OIL COMPANY, INC., Defendants.

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action against the above-named defendants, and complains and alleges as follows:

I

Jurisdiction and Venue

1. This complaint is filed and this action is instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (15 U.S.C. § 4), as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, in order to prevent and restrain the continuing violation by the defendants as hereinafter alleged, of Section 1 of said Act. (15 U.S.C. § 1)

2. Each of the defendants transacts business and is found within the Southern District of New York.

II

Defendants

3. Each of the following corporations is made a defendant. Each of said corporations is organized pursuant to,

and exists under, the laws of the State and has its principal place of business in the city indicated below.

Name of Corporation	State of Incorporation	Principal Place of Business
Concentrated Phosphate Export Association, Inc.	Delaware	New York, New York
American Cyanamid Company	Maine	Wayne, New Jersey
W. R. Grace & Company	Connecticut	New York, New York
International Minerals & Chemical Corporation	New York	Skokie, Illinois
Tennessee Corporation	Delaware	New York, New York
Socony Mobil Oil Company, Inc.	New York	New York, New York

4. On or about June 14, 1963, defendant Tennessee Corporation, a wholly owned subsidiary of the Cities Service Company, acquired the assets and took over the operation of the business of a New York corporation also named Tennessee Corporation. Whenever the activities, undertakings, arrangements or agreements of the defendants are alleged herein to have occurred prior to June 14, 1963, it shall refer, insofar as defendant Tennessee Corporation is concerned, to the predecessor Tennessee Corporation.

5. Defendant Socony Mobil Oil Company, Inc. acquired all of the assets of the Virginia-Carolina Chemical Corporation, a Virginia corporation on or about November 29, 1963, and continued the business of Virginia-Carolina Chemical Corporation as a separate operating division under the name V-C Chemical Company, a division of Socony Mobil. Whenever the activities, undertakings, arrangements or agreements of the defendants are alleged herein to have occurred prior to November 29, 1963, it shall refer, insofar as defendant Socony Mobil is concerned, to the predecessor Virginia-Carolina Chemical Corporation.

6. Defendant Concentrated Phosphate Export Association, Inc. (CPEA) is a corporation organized and existing under the laws of the State of Delaware, as a non-profit, membership corporation. Its membership consists of the remaining defendants, above named (hereinafter collectively referred to as the "defendant producers"), each of whom, or its corporate predecessor, was at all material times charged in the complaint, engaged in the manufacture of concentrated phosphatic fertilizer products. Defendant CPEA was organized on or about September 21, 1961, for the purpose of acting as an exporter of the said products manufactured by its members.

III

Trade and Commerce

7. Concentrated phosphatic fertilizer products include any concentrated phosphatic material, whether liquid or solid, used as plant food, and containing in excess of 39% available phosphorus (P_2O_5). As used herein, "triple superphosphate" means such product wherein the available phosphorus is from 42% to 48%. Ammonium phosphate, as used herein, refers to both "ammonium phosphate" and "diammonium phosphate," both of which contain nitrogen in addition to phosphorus, in proportions ranging from 16-48-0 to 21-53-0 (Nitrogen, phosphorus, and potash, respectively).

8. The principal source of phosphorus used in fertilizer is phosphate rock, a mined product. The concentrated phosphate products, which are the subject of this complaint, are produced by treating phosphate rock chemically.

9. Following World War II, and continuing to the present time, the United States Government, pursuant to its mutual assistance or foreign aid program to underdeveloped nations, has enabled the Republic of Korea to obtain from United States producers large quantities of fertilizer products including the aforementioned concentrated phosphatic fertilizer products.

10. During the period charged in the complaint, pursuant to procurement policies of the United States Government agencies administering the foreign aid programs, procurement of these products for shipment to Korea, was limited substantially to sources within the United States. This preference program was termed the "Buy America" program.

11. During the period charged in the complaint, the purchase of these products for the foreign aid program to Korea, was carried out by either one of two methods. Under one method, the General Services Administration (GSA) an agency of the United States Government, invited bids from suppliers, determined the successful bidders, made awards, paid for and (with one minor exception) accepted delivery and title to the commodities purchased, all within the United States. Under the other method of procurement, the United States Government, acting through the State

Department's Agency for International Development (AID), authorized the procurement of the product, allocated funds for the procurement and paid the supplier (through a commercial bank) after delivery with United States Government funds. Under this second method, the Republic of Korea was permitted to solicit bids from suppliers and to make awards to the lowest bidders, provided, the bids conformed to the requirements of AID regulations governing such procurements and shipments of such materials, including *inter alia*, a requirement that the containers be labeled to indicate that the material was provided under United States foreign aid programs.

12. Throughout the Korean program, and particularly after "Buy America" was instituted, American producers of concentrated phosphatic fertilizers, including the defendant producers, have supplied the Korean foreign aid market with the bulk of such products purchased, to the substantial exclusion of the balance of world competition. During the period covered by the complaint, the defendant producers have supplied the largest portion of such American materials purchased for Korean foreign aid.

13. During the period covered by this complaint, over 700,000 metric tons of concentrated phosphatic fertilizers manufactured by the defendant producers were purchased for the Korean foreign aid program at a cost to the United States Government of over $46,000,000. The said products were manufactured in plants of said defendants located in the State of Florida and other states and then shipped to Gulf Coast seaports for further trans-shipment by ship to Korea.

IV

Offense Charged

14. Commencing in or about 1961, and continuously thereafter up to and including the date of the filing of this complaint, the defendants have engaged in an unlawful combination in unreasonable restraint of the hereinbefore described trade and commerce in concentrated phosphatic fertilizers sold under the United States foreign aid program for Korea, in violation of Section 1 of the Sherman Act.

15. The aforesaid combination has consisted of a continuing agreement, understanding and concert of action among the defendants to allocate business among the defendant producers and to eliminate price competition in sales of concentrated phosphatic fertilizer made pursuant to the United States foreign aid program for Korea. The combination and certain of the acts, agreements, arrangements and understandings which formed a part of and were used in effectuation thereof are hereinafter more fully set forth and described.

16. Some time in or about 1961, the defendant producers agreed among themselves that thereafter the sales for the Korean foreign aid program of concentrated phosphatic fertilizers produced by any of them would be handled by a single sales organization, that such sales organization would allocate the available business among the member producers and would determine the prices at which such sales would be made.

17. Said sales organization took the form of an association, the defendant CPEA, which purported to be an export association within the meaning of the Webb-Pomerene Act, 40 Stat. 516 (15 U.S.C. 61 *et seq.*), the membership of which consisted of the defendant producers.

18. After its formation, in accordance with the agreement, CPEA quoted prices or entered bids to supply the defendant producers' concentrated phosphatic fertilizers for use in foreign aid procurements for Korea, the defendants agreeing among themselves on the prices to be charged therefor and the allocation of tonnages to be supplied by each of the respective defendant producers.

19. After the formation of CPEA, none of the defendant producers submitted individual bids for such procurements, either directly or through independent exporters, CPEA being the exclusive sales agent for each defendant producer on these procurements.

20. Initially, CPEA sold concentrated phosphatic fertilizers to independent exporters who in turn entered bids for the procurements for Korean foreign aid, accepted delivery from CPEA at an ocean port in the United States and handled the shipment to Korea. Commencing in or about 1963, CPEA discontinued sales to independent exporters and thereafter entered bids on such procurements in its own name.

V

Effects of Violation

21. The aforesaid combination has had and will continue to have the following effects, among others:

(a) Price competition among the defendant producers with respect to concentrated phosphatic fertilizers sold by them for the United States' foreign aid program for Korea has been eliminated.

(b) The defendant producers have divided and allocated among themselves the supplying of concentrated phosphatic fertilizers for such program.

(c) Independent exporters have been deprived of the right to purchase concentrated phosphatic fertilizers for sale for the Korean foreign aid program.

(d) The United States has been compelled to pay for the concentrated phosphatic fertilizers purchased by itself for the foreign aid program, and to support the said program at prices fixed by the defendants by agreement among themselves.

(e) The United States has been deprived of the right to have its foreign aid program procurements made at prices reflecting the free play of economic competitive forces.

Prayer

WHEREFORE, Plaintiff prays that:

1. The court adjudge and decree that the defendants have combined to restrain and have restrained the aforesaid interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act.

2. Each defendant, its officers, directors, agents, employees, representatives, and all other persons acting or claiming to act in its behalf, be perpetually enjoined and restrained from continuing, renewing or reviving any similar violation.

3. The Concentrated Phosphate Export Association, Inc., be dissolved and for a period of ten years following entry of judgment, each defendant be enjoined from forming, entering into, belonging to, or participating in any association or organization having for its object the sale of fer-

tilizers produced by more than one fertilizer manufacturer, unless it has obtained Court approval, after application and an affirmative showing that such action would be in the public interest.

4. Each defendant be enjoined from continuing in effect any prices for concentrated phosphatic fertilizers for the foreign aid program or any export market reached by agreement with any other defendant and except as may be permitted by the Court, pursuant to the preceding paragraph hereof, perpetually enjoined from issuing prices not founded upon the exercise of its independent business judgment.

5. The plaintiff have such other and further relief as the nature of the case may require and the court may deem just and proper in the premises.

6. The plaintiff recover the costs of this action.

Dated:—

Burton R. Thorman. E. Leo Backus, Attorneys, Department of Justice.

Nicholas deB. Katzenbach, Acting Attorney General. William H. Orrick, Jr., Assistant Attorney General. Lewis Bernstein, Attorney, Department of Justice. John J. Galgay, Attorney, Department of Justice.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

64 Civil 3914

UNITED STATES OF AMERICA, Plaintiff,

against

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., AMERICAN CYANAMID COMPANY, W. R. GRACE & CO., INTERNATIONAL MINERALS & CHEMICAL CORPORATION, TENNESSEE CORPORATION and SOCONY MOBIL OIL COMPANY, INC., Defendants.

ANSWER OF DEFENDANT W. R. GRACE & CO.

Defendant W. R. Grace & Co., by its attorneys, Cahill, Gordon, Reindel & Ohl, for its answer to the complaint herein:

1. Denies the allegations contained in paragraph 1 of the complaint, except admits that plaintiff seeks to rely on the statutory provisions referred to therein for the jurisdiction of this Court.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint, except admits that The Concentrated Phosphate Export Association, Inc. and W. R. Grace & Co. transact business within the Southern District of New York.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the complaint, except admits that The Concentrated Phosphate Export Association, Inc. is incorporated in the State of Delaware and has its principal place of business in New York, New York, and that W. R. Grace & Co. is incorporated in the State of Connecticut and has its principal place of business in New York, New York.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the complaint.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the complaint.

6. Denies the allegations contained in paragraph 6 of the complaint, except admits that The Concentrated Phosphate Export Association, Inc. (CPEA) was incorporated on September 12, 1961, and now exists under the laws of the State of Delaware as a non-profit membership corporation, to engage solely in export trade, as the term "export trade" is defined in Section 1 of the Act of April 10, 1918, Chap. 50, 40 Stat. 516 (15 U.S.C. § 61), as amended, entitled "An Act to promote export trade", commonly known as the Webb Export Trade Associations Act, and more specifically to engage in trade and commerce in triple superphosphate and certain other concentrated phosphatic materials which are for export or are to be exported or are in the course of being exported from the United States to any foreign nation; and that CPEA's members are American Cyanamid Company, W. R. Grace & Co., International Minerals & Chemical Corporation, Tennessee Corporation, and Socony Mobil Oil Company, Inc., each of whom is engaged in the manufacture of certain concentrated phosphatic fertilizer products.

7. Admits that plaintiff in its complaint uses the terms defined in paragraph 7 as they are defined therein.

8. Admits the allegations contained in paragraph 8 of the complaint.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the complaint.

10. Denies the allegations contained in paragraph 10 of the complaint.

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the complaint.

12. Denies the allegations contained in paragraph 12 of the complaint.

13. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the complaint.

14. Denies the allegations contained in paragraph 14 of the complaint.

15. Denies the allegations contained in paragraph 15 of the complaint.

16. Denies the allegations contained in paragraph 16 of the complaint.

17. Denies the allegations contained in paragraph 17 of the complaint.

18. Denies the allegations contained in paragraph 18 of the complaint.

19. Denies the allegations contained in paragraph 19 of the complaint, except denies knowledge or information sufficient to form a belief as to the truth of the allegation that after the formation of CPEA, none of the defendant producers submitted individual bids for such programs either directly or through independent exporters.

20. Denies the allegations contained in paragraph 20 of the complaint.

21. Denies the allegations contained in paragraph 21 of the complaint.

First Affirmative Defense

22. The complaint fails to state a claim against defendant W. R. Grace & Co. upon which relief can be granted.

Second Affirmative Defense

23. CPEA was organized and operates in full compliance with the provisions of the Webb Export Trade Associations Act, 40 Stat. 516-518 (15 U.S.C. §§ 61-65).

24. The membership and participation of W. R. Grace & Co. in CPEA and all of the agreements made and acts done pursuant thereto have been in full compliance with the provisions of that Act. The Webb Act in these circumstances exempts the transactions referred to in the complaint from the provisions of the Sherman Act.

Third Affirmative Defense

25. The Federal Trade Commission was informed that some of CPEA's export sales were financed by AID under the Foreign Assistance Program of the United States.

26. The Federal Trade Commission has neither summoned CPEA to appear before it nor in any way indicated to CPEA that its organization or any of its agreements or other acts constituted or might constitute activities forbidden by the Webb Export Trade Associations Act or any other antitrust statute.

27. Primary jurisdiction of the matters alleged in the complaint herein is by the terms of the Webb Export Trade Associations Act lodged in the Federal Trade Commission.

Fourth Affirmative Defense

28. The transactions of the defendants herein, insofar as they relate to and are subject to the laws of the United States and insofar as they occurred, have been subject to the jurisdiction of the Federal Trade Commission under the Act of Congress of April 10, 1918, Chap. 50, 40 Stat. 516, commonly known as the Webb Export Trade Act.

29. The Federal Trade Commission with knowledge of the nature of these transactions for over three years raised no objection thereto and defendants in reliance upon the aforesaid participated in these transactions. Relief sought by plaintiffs in the present action would deny to defendants their exemptions, privileges and immunities under such Act by reason of such participation and accordingly the relief sought by plaintiff in the present action should, under principles of equitable estoppel, be denied.

Fifth Affirmative Defense

30. The United States Government through the Agency for International Development and other Federal agencies dealt with and transacted business with The Concentrated Phosphate Export Association, Inc., with full knowledge of the composition of the association and the business activities carried on by it. Accordingly, the relief sought by plaintiff in the present action should, under principles of equitable estoppel, be denied.

Prayer

WHEREFORE, defendant W. R. Grace & Co. demands judgment dismissing the complaint herein as to it, together with its costs and disbursements, and prays for such other and further relief as the Court may deem just and proper.

Dated: New York, New York, August 20, 1965.

Cahill, Gordon, Reindel & Ohl. By Gerald C. Van Cise, A Member of the Firm, 80 Pine Street, New York, New York 10005, Attorneys for Defendant W. R. Grace & Co.

Filed August 17, 1965

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

64 Civil 3914

UNITED STATES OF AMERICA, Plaintiff,

against

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., AMERICAN CYANAMID COMPANY, W. R. GRACE & CO., INTERNATIONAL MINERALS & CHEMICAL CORPORATION, TENNESSEE CORPORATION and SOCONY MOBIL OIL COMPANY, INC., Defendants.

ANSWER OF DEFENDANT AMERICAN CYANAMID COMPANY

The defendant American Cyanamid Company, by its undersigned attorneys, for its Answer to the Complaint in the above-entitled action:

1. Denies the allegations of Paragraph 1 of the Complaint, except admits that plaintiff seeks to rely on the statutory provisions referred to therein for the jurisdiction of this Court.

2. As to Paragraph 2 of the Complaint,

a. admits that it transacts business within the Southern District of New York;

b. admits on information and belief that each of the other defendants transacts business within the Southern District of New York; and

c. neither admits nor denies that any of the defendants named in the Complaint are found within the Southern District of New York since such allegation is a conclusion of law.

3. As to Paragraph 3 of the Complaint, admits the allegations contained therein as to Concentrated Phosphate Export Association and American Cyanamid Company and is without knowledge or information sufficient to form a belief as to the truth of the other allegations in said Paragraph.

4. Is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the Complaint.

5. Is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 of the Complaint.

6. As to Paragraph 6 of the Complaint,

a. admits that CPEA is a non-profit, membership corporation organized and existing under the laws of the State of Delaware;

b. admits that CPEA's present membership consists of the "defendant producers";

c. admits that at all material times American Cyanamid Company was engaged in the manufacture of certain concentrated phosphatic fertilizer products;

d. admits on information and belief that at all material times each of the other "defendant producers," or its corporate predecessor, was engaged in the manufacture of certain concentrated phosphatic fertilizer products;

e. admits that CPEA was organized on or about September 12, 1961;

f. denies that CPEA was organized for the purpose alleged in said Paragraph 6;

g. alleges that CPEA was organized and exists solely to engage in export trade as the term "export trade" is defined in Section 1 of the Act of Congress of April 10, 1918, c. 50, 40 Stat. 516 (15 U.S.C. § 61), commonly known as the Webb-Pomerene Act.

h. further alleges that CPEA and its members have complied in all respects with the provisions of the aforesaid Webb-Pomerene Act, c. 50, 40 Stat. 516 18 (15 U.S.C. §§ 61-65).

7. Admits that plaintiff in its Complaint uses the terms defined in Paragraph 7 as they are defined therein.

8. Admits the allegations of Paragraph 8 of the Complaint.

9. Admits on information and belief that subsequent to September, 1961, the Republic of Korea has used funds obtained from the United States Government through the Agency for International Development (AID) to pay for

some of its purchases of fertilizer products including concentrated phosphatic fertilizer products; and Denies all other allegations contained in Paragraph 9 of the Complaint.

10. Denies the allegations contained in Paragraph 10 of the Complaint.

11. Admits on information and belief that pursuant to authorizations arranged by the Office of Supply of the Republic of Korea (OSROK) with AID, funds were made available by AID to OSROK from time to time to finance OSROK's purchase of various commodities, including phosphatic fertilizer materials for shipment to and use in Korea; that pursuant to such authorizations, and in accordance with formal competitive bidding procedures, in 1961 and subsequent years, OSROK solicited bids from suppliers in various foreign countries and in the United States to supply phosphatic fertilizer materials to Korea and made awards to foreign and United States bidders; that the General Services Administration (GSA), an agency of the United States Government, on two occasions, once in 1963 and again in 1964, assisted in OSROK's procurements of phosphatic fertilizer materials for shipment to and use in Korea; and Denies all other allegations of Paragraph 11 of the Complaint.

12. Denies world competition has been substantially excluded from supplying concentrated phosphatic fertilizers to the Republic of Korea when United States Government funds have been used to finance such purchases and is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in Paragraph 12 of the Complaint.

13. Admits that the concentrated phosphatic fertilizers which CPEA sold for export to Korea were manufactured in plants of its members located in the State of Florida and then shipped to Korea via Florida Gulf Coast seaports; and is without knowledge or information sufficient to form a belief as to the truth of all other allegations contained in Paragraph 13 of the Complaint.

14. Denies the allegations of Paragraph 14 of the Complaint.

15. Denies the allegations of Paragraph 15 of the Complaint.

16. Denies the allegations of Paragraph 16 of the Complaint.

17. Denies the allegations of Paragraph 17 of the Complaint; and alleges that CPEA is, as plaintiff well knows, an export association within the meaning of the Webb-Pomerene Act, 40 Stat. 516 (15 U.S.C. §§ 61-65).

18. Denies the allegations contained in Paragraph 18 of the Complaint.

19. Denies that CPEA is its exclusive sales agent on sales to and for the Republic of Korea or otherwise; admits that since the formation of CPEA it has not submitted individual bids to sell concentrated phosphatic fertilizers to or for the Republic of Korea; and, except as denied or admitted herein, is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 19 of the Complaint.

20. Denies the allegations of Paragraph 20 of the Complaint; and alleges that CPEA during a part of the period covered by the Complaint offered to sell concentrated phosphatic fertilizers to brokers who submitted bids to sell such products to or for the Republic of Korea and that CPEA sold such products to brokers who had received awards as a result of such bids.

21. Denies the allegations of Paragraph 21 of the Complaint.

First Affirmative Defense

22. The Complaint fails to state a claim against the defendant American Cyanamid Company upon which relief can be granted.

Second Affirmative Defense

23. American Cyanamid Company's membership and participation in CPEA, and all of the agreements made and acts done pursuant thereto, have been in full compliance with the provisions of the Webb-Pomerene Act, 40 Stat. 516-518 (15 U.S.C. §§ 61-65), which specifically provides, *inter alia* "that nothing contained in the [Sherman Act] * * * shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade, and actually engaged solely in such export

trade, or an agreement made or act done in the course of export trade by such association * * *" (15 U.S.C. § 62).

24. CPEA was organized and operates in full compliance with the aforesaid provisions of the Webb-Pomerene Act and all of the acts and agreements of which the plaintiff complains herein are acts and agreements done in the course of export trade by said association.

Third Affirmative Defense

25. The Webb-Pomerene Export Trade Associations Act provides *inter alia* that whenever "the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association" contravenes the requirements of the Act, "it shall summon such association * * * to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said Commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper." (15 U.S.C. § 65)

26. The Federal Trade Commission was informed that some of CPEA's export sales were financed by AID under the Foreign Assistance Program of the United States, and has requested and received reports from CPEA stating the total amount of CPEA's AID financed sales for the years 1961 and 1962.

27. The Federal Trade Commission has neither summoned CPEA to appear before it nor in any way indicated to CPEA that its organization or any of its agreements or other acts constituted or might constitute activities forbidden by the Webb-Pomerene Export Trade Associations Act or any other antitrust statute.

28. Primary jurisdiction of the matters alleged in the Complaint herein is by the terms of the Webb-Pomerene Export Trade Associations Act lodged in the Federal Trade Commission and, since the prerequisites of that Act have

not been met, this Honorable Court is without jurisdiction to grant relief on the claim alleged in this Complaint.

Fourth Affirmative Defense

29. Numerous Webb-Pomerene Export Trade Associations, other than CPEA, are selling various commodities pursuant to the foreign aid program administered by AID and the so-called agricultural assistance program commonly referred to as Public Law 480. Many such associations sold various commodities under the foreign aid programs administered by AID's predecessor agencies, such as International Cooperation Administration and under the World War II foreign assistance programs commonly referred to as Lend-Lease.

30. The transactions referred to in the Complaint were induced in part by agencies of the United States Government—the Agency for International Development and the General Services Administration—and were carried out with the participation, acquiescence and approval of these agencies as well as the Federal Trade Commission, said agencies having full knowledge that defendant CPEA was a Webb-Pomerene association and having been fully advised of the membership, organization, purposes and operations of CPEA.

31. American Cyanamid Company would not have participated in any sales by a Webb-Pomerene association except for the United States Government's inducement, participation, acquiescence and approval as hereinabove alleged, and therefore, plaintiff is not now entitled to the equitable relief it seeks.

Prayer

WHEREFORE, defendant American Cyanamid Company demands judgment dismissing the Complaint herein as to it, together with its costs and disbursements, and prays for such other and further relief as the Court may deem just and proper.

Dated: New York, New York, August 16, 1965.

Donovan, Leisure, Newton & Irvine. By Samuel W. Murphy, Jr., A Member of the Firm, Two Wall Street, New York, N. Y. 10005, Attorneys for Defendant, American Cyanamid Company.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 64 Civil 3914

UNITED STATES OF AMERICA, Plaintiff,

v.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., AMERICAN CYANAMID COMPANY, W. R. GRACE & CO., INTERNATIONAL MINERALS & CHEMICAL CORPORATION, TENNESSEE CORPORATION and SOCONY MOBIL OIL COMPANY, INC., Defendants.

ANSWER

Defendant, Concentrated Phosphate Export Association, Inc., (CPEA) by its attorneys, Hollabaugh & Jacobs, answers the complaint filed herein on December 21, 1964, as follows:

1. DENIES the allegations of paragraph 1 of the complaint, except admits that plaintiff seeks to rely on the statutory provisions referred to therein for the jurisdiction of this Court.

2. ADMITS that CPEA transacts business within the Southern District of New York, but being without sufficient information to form a belief DENIES all other allegations in paragraph 2.

3. ADMITS that CPEA is organized pursuant to and exists under the laws of the State of Delaware and has its principal place of business in New York, New York, and being without sufficient information to form a belief DENIES all other allegations of paragraph 3.

4. Being without sufficient information to form a belief, DENIES the allegations of paragraph 4.

5. Being without sufficient information to form a belief, DENIES the allegations of paragraph 5.

6. ADMITS that CPEA was incorporated on September 12, 1961, and now exists under the laws of the State of Delaware as a non-profit membership corporation, to engage solely in export trade, as the term "export trade" is defined in Section 1 of the Act of April 10, 1918, Chap. 50, 40 Stat. 516 (15 USC § 61), as amended, entitled "An

Act to promote export trade," commonly known as the Webb Export Trade Associations Act, and more specifically to engage in trade and commerce in triple superphosphate and certain other concentrated phosphatic materials which are for export or are to be exported or are in the course of being exported from the United States to any foreign nation; and that CPEA's present members are American Cyanamid Company, W. R. Grace & Company, International Minerals & Chemical Corporation, Tennessee Corporation, and Socony Mobil Oil Company, Inc., each of which is engaged in the manufacture of certain concentrated phosphate fertilizer products. All other allegations in paragraph 6 are DENIED.

7. ADMITS that plaintiff in its complaint uses the terms in paragraph 7 as they are defined therein.

8. ADMITS the allegations of paragraph 8.

9. ADMITS on information and belief that subsequent to September, 1961, for some of its purchases of fertilizer products including concentrated phosphatic fertilizer products, the Republic of Korea has used funds obtained from the United States Government in accordance with a program administered by the Agency for International Development (AID) to finance such purchases; and DENIES all other allegations in that paragraph.

10. DENIES the allegations of paragraph 10.

11. ADMITS on information and belief that pursuant to authorizations arranged by the Office of Supply of the Republic of Korea (OSROK) with AID, funds were made available by AID to OSROK from time to time to finance purchase of various commodities, including phosphatic fertilizer materials for shipment to and use in Korea; that pursuant to such authorizations, and in accordance with formal competitive bidding procedures, in 1961 and subsequent years, OSROK solicited bids to supply phosphatic fertilizer materials to Korea from suppliers in various foreign countries and in the United States and made awards to foreign and U. S. bidders; that the General Services Administration (GSA), an agency of the United States Government, on two occasions, once in 1963 and again in 1964, assisted in foreign aid procurements of phosphatic fertilizer materials for shipment to and use in Korea; and DENIES all other allegations of paragraph 11.

12. DENIES the allegations of paragraph 12.

13. ADMITS that the phosphatic fertilizer materials which CPEA sold for export to Korea were manufactured in plants of its members located in the State of Florida and then shipped to Korea via Florida Gulf Coast seaports; and DENIES all other allegations of paragraph 13.

14. DENIES the allegations of paragraph 14.

15. DENIES the allegations of paragraph 15.

16. DENIES the allegations of paragraph 16.

17. ADMITS that CPEA is an export trade association formed under and operating pursuant to the Webb Export Trade Associations Act (15 USC § 61-65), whose members are named above; and DENIES all other allegations of paragraph 17.

18. DENIES the allegations of paragraph 18.

19. DENIES the allegations of paragraph 19.

20. DENIES the allegations of paragraph 20.

21. DENIES the allegations of paragraph 21.

First Affirmative Defense

22. CPEA was organized and at all times has been operated in strict compliance with the requirements of the Webb Export Trade Associations Act, and it has engaged only in export trade as that term is defined in that Act.

23. CPEA has filed all reports required under the Webb Export Trade Associations Act and, in addition, has filed special reports which have been requested from time to time by the Federal Trade Commission. Among other things, CPEA has reported its total annual sales for the years 1961, 1962, and 1963 and, at FTC's request, separately stated for the years 1961 and 1962 CPEA's total sales believed to have been made under AID financing arrangements.

24. CPEA's organization and operation does not and cannot constitute an unlawful combination in violation of the Sherman Act as alleged in the complaint because the Webb Act specifically provides "That nothing contained in the [Sherman Act] * * * shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade, and actually engaged solely in such export trade, or an agreement made or act

done in the course of export trade by such association * * *." (15 USC § 62). The complaint, therefore, fails to state a claim upon which relief can be granted.

Second Affirmative Defense

25. The Webb Export Trade Associations Act provides *inter alia* that whenever "the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association" contravenes the requirements of the Act, "it shall summon such association * * * to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper." (15 USC § 65)

26. The Federal Trade Commission was informed that some of CPEA's export sales were financed by AID under the Foreign Assistance Program of the United States, and has requested and received reports from CPEA stating the total amount of CPEA's AID-financed sales for the years 1961 and 1962.

27. The Federal Trade Commission has neither summoned CPEA to appear before it nor in any way indicated to CPEA that its organization or any of its agreements or other acts constituted or might constitute activities forbidden by the Webb Export Trade Associations Act or any other antitrust statute.

28. Primary jurisdiction of the matters alleged in the complaint herein is by the terms of the Webb Export Trade Associations Act lodged in the Federal Trade Commission and, since the prerequisites of that Act have not been met, this Honorable Court is without jurisdiction to grant relief on the claim alleged in this complaint.

Prayer

WHEREFORE, defendant CPEA demands judgment dismissing the complaint herein as to it, together with its costs and disbursements, and prays for such other and further relief as the Court may deem just and proper.

Dated: New York, New York, August 16, 1965.

Hollabaugh & Jacobs. By: —— ——, A Member of the Firm. By: —— ——, A Member of the Firm, 910 Seventeenth Street, N.W,. Washington, D. C. 20006, Attorneys for Defendant Concentrated Phosphate Export Association, Inc.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 64 Civil 3914

UNITED STATES OF AMERICA, Plaintiff,

v.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., AMERICAN CYANAMID COMPANY, W. R. GRACE & CO., INTERNATIONAL MINERALS & CHEMICAL CORPORATION, TENNESSEE CORPORATION and SOCONY MOBIL OIL COMPANY, INC., Defendants.

AFFIDAVIT OF SERVICE

Washington, D. C.: ss.:

Douglas V. Rigler, being duly sworn, says that he served the attached answer upon Burton Thorman, Attorney, United States Department of Justice, attorney for Plaintiff, on Monday, August 16, 1965, by depositing a copy in the United States mails, post paid, addressed to him at the United States Department of Justice, Washington, D. C.

Douglas V. Rigler.

Subscribed and sworn to before me this 13th day of August, 1965.

Florinda F. Sariego, Notary Public.

My Commission Expires May 31, 1968.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 64 Civil 3914

UNITED STATES OF AMERICA, Plaintiff,

v.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., AMERICAN CYANAMID COMPANY, W. R. GRACE & CO., INTERNATIONAL MINERALS & CHEMICAL CORPORATION, TENNESSEE CORPORATION and SOCONY MOBIL OIL COMPANY, INC., Defendants.

ANSWER OF DEFENDANT SOCONY MOBIL OIL COMPANY, INC.

The defendant, Socony Mobil Oil Company, Inc., hereinafter called Socony Mobil, by its attorneys, in answer to the complaint filed herein on December 21, 1964, says as follows:

1. Admits so much of such part of Paragraph 1 of the complaint as alleges that plaintiff seeks to rely upon the Sherman Act for the jurisdiction of this Court; and defendant Socony Mobil denies each and every other allegation contained in said Paragraph 1 of the complaint.

2. Admits so much of such parts of Paragraph 2 of the complaint as allege that Socony Mobil and The Concentrated Phosphate Export Association, Inc. transact business within the Southern District of New York; and defendant Socony Mobil is without knowledge or information sufficient to form a belief as to the truth of the other allegations of said Paragraph 2 of the complaint.

3. Admits so much of such parts of Paragraph 3 of the complaint as allege that defendant Socony Mobil is incorporated in the State of New York, with its principal place of business in New York, New York, and that The Concentrated Phosphate Export Association, Inc. is incorporated in the State of Delaware, with its principal place of business in New York, New York; and defendant Socony Mobil is without knowledge or information sufficient to form a belief as to the truth of the other allegations of said Paragraph 3 of the complaint.

4. Is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 4 of the complaint.

5. Admits so much of such parts of Paragraph 5 of the complaint as allege that Socony Mobil, on November 29, 1963, acquired Virginia-Carolina Chemical Corporation, and that on that date Virginia-Carolina Chemical Corporation was merged into Socony Mobil; and defendant Socony Mobil denies each and every other allegation contained in said Paragraph 5 of the complaint.

6. Admits so much of such parts of Paragraph 6 of the complaint as allege that defendant The Concentrated Phosphate Export Association, Inc. (1) is a corporation organized and existing under the laws of the State of Delaware, (2) is a non-profit membership corporation, and (3) was organized on or about September 21, 1961 for the purpose of acting as an exporter within the meaning of the Webb-Pomerene Act (15 U.S.C. 61 *et seq.*) of the said products manufactured by its members; and defendant Socony Mobil denies each and every other allegation of said Paragraph 6 of the complaint.

7. Admits that plaintiff in its complaint uses the terms defined in Paragraph 7 of the complaint as they are defined therein.

8. Admits the allegations of Paragraph 8 of the complaint.

9. Is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 9 of the complaint.

10. Denies each and every allegation of Paragraph 10 of the complaint.

11. Is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 11 of the complaint.

12. Denies each and every allegation of Paragraph 12 of the complaint.

13. Is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 13 of the complaint.

14-21. Denies each and every allegation of Paragraphs 14 through 21, inclusive, of the complaint.

First Defense

The complaint should be dismissed as to defendant Socony Mobil because it fails to state a cause of action against said named defendant upon which relief can be granted.

Second Defense

The complaint should be dismissed as to defendant Socony Mobil because it is moot as to said named defendant. On November 29, 1963, Virginia-Carolina Chemical Corporation was merged into Socony Mobil. Upon said date, November 29, 1963, Virginia-Carolina Chemical Corporation was dissolved and all of its assets were transferred to Socony Mobil Oil Company, Inc. Since the said acquisition described herein, Socony Mobil has operated the business acquired from Virginia-Carolina Chemical Corporation in a lawful fashion and within the provisions of the Webb-Pomerene Act (15 U.S.C. 61 *et seq.*).

Third Defense

The complaint should be dismissed as to defendant Socony Mobil because the acts complained of in the complaint as constituting a violation of the Sherman Act come within the immunity from the antitrust laws provided by the Webb-Pomerene Act (15 U.S.C. 61 *et seq.*).

Fourth Defense

The complaint should be dismissed as to defendant Socony Mobil because the United States Government, through the Federal Trade Commission, the Agency for International Development, and other federal agencies, dealt with and transacted business with The Concentrated Phosphate Export Association, Inc. with full knowledge of the composition of the Association and the business activities carried on by it.

Fifth Defense

The complaint should be dismissed as to defendant Socony Mobil for lack of jurisdiction because the Webb-Pomerene Act (15 U.S.C. 61 *et seq.*) grants primary juris-

diction to the Federal Trade Commission and further because the prerequisites of that Act have not been complied with.

Prayer

WHEREFORE, defendant Socony Mobil Oil Company, Inc. prays that a judgment be entered dismissing the complaint herein as to it; that defendant's costs herein be taxed to plaintiff; and that the Court grant such other and further relief as may be deemed just and proper.

Dated: New York, New York, August 16, 1965.

Walter S. Avery, General Counsel, Mobil Chemical Company, Socony Mobil Oil Company, Inc., 150 East 42nd Street, New York, New York 10017. Edward F. Howrey, John Bodner, Jr., Howrey, Simon, Baker & Murchison, 1707 H Street, Northwest, Washington, D. C. 20006, Attorneys for Defendant, Socony Mobil Oil Company, Inc.

Of Counsel: John J. Scott, R. Daniel Smith, Jr., Socony Mobil Oil Company, Inc., 150 East 42nd Street, New York, New York 10017.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 64 Civil 3914

UNITED STATES OF AMERICA, Plaintiff,

v.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., AMERICAN CYANAMID COMPANY, W. R. GRACE & CO., INTERNATIONAL MINERALS & CHEMICAL CORPORATION, TENNESSEE CORPORATION and SOCONY MOBIL OIL COMPANY, INC., Defendants.

CERTIFICATE OF SERVICE

I do hereby certify that a copy of "Answer of Defendant Socony Mobil Oil Company, Inc." has been served by mail to the following the 16th day of August, 1965:

Burton Thorman, Esq., Department of Justice, Antitrust Division, Washington 25, D. C., Counsel for Plaintiff, United States of America.

Marcus A. Hollabaugh, Esq., Suite 817, Barr Building, 910 Seventeenth Street, N.W., Washington, D. C. 20006, Counsel for Defendant, The Concentrated Phosphate Export Association, Inc.

Samuel W. Murphy, Jr., Esq., Donovan, Leisure, Newton & Irvine, Two Wall Street, New York, New York 10005, Counsel for Defendant, American Cyanamid Company.

Haliburton Fales, II, Esq., White & Case, 14 Wall Street, New York, New York 10005, Counsel for Defendant, International Minerals & Chemical Corporation.

Douglas Cutler, Esq., Cahill, Gordon, Reindel & Ohl, 80 Pine Street, New York, New York 10005, Counsel for Defendant, W. R. Grace & Co.

Randolph Guggenheimer, Esq., Guggenheimer & Untermyer, 80 Pine Street, New York, New York 10005, Counsel for Defendant, Tennessee Corporation.

Howrey, Simon, Baker & Murchison, 1707 H Street, Northwest, Washington, D. C. 20006. By: John Bodner, Jr., Attorneys for Defendant, Socony Mobil Oil Company, Inc.

Filed August 13, 1965

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

64 Civil 3914

UNITED STATES OF AMERICA, Plaintiff,

against

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., AMERICAN CYANAMID COMPANY, W. R. GRACE & CO., INTERNATIONAL MINERALS & CHEMICAL CORPORATION, TENNESSEE CORPORATION and SOCONY MOBIL OIL COMPANY, INC., Defendants.

ANSWER

The defendant International Minerals & Chemical Corporation by its attorneys, White & Case, for its Answer to the Complaint herein:

1. Denies each and every allegation of paragraph 1 of the Complaint, except admits that the action purports to be instituted under the statutory provisions referred to therein.

2. Admits the allegations of paragraphs 2 and 3 of the Complaint insofar as they relate to defendant International Minerals & Chemical Corporation, and is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraphs 2 and 3 of the Complaint relating to other defendants.

3. Is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraphs 4 and 5 of the Complaint.

4. Denies each and every allegation of paragraph 6 of the Complaint, except admits that defendant Concentrated Phosphate Export Association Inc. (CPEA) is a corporation incorporated on September 12, 1961 and existing under the laws of the State of Delaware, as a non-profit, membership corporation, to engage solely in export trade, as the term "export trade" is defined in Section 1 of the Act of April 10, 1918, Chap. 50, 40 Stat. 516 (15 U.S.C. § 61 *et seq.*), as amended, entitled "An Act to Promote Export Trade" commonly known as the Webb Export Trade Associations

Act, that its present membership consists of American Cyanamid Company, W. R. Grace & Company, International Minerals & Chemical Corporation, Tennessee Corporation, and Socony Mobil Oil Company, Inc., and that International Minerals & Chemical Corporation was at all material times charged in the Complaint engaged in the manufacture of concentrated phosphatic fertilizer products, and on information and belief that the other members of CPEA, or their corporate predecessors, were at all material times charged in the Complaint engaged in the manufacture of certain concentrated phosphatic fertilizer products.

5. Defendant International Minerals & Chemical Corporation is not required to plead responsively to the definition of terms set forth in paragraph 7 of the Complaint as plaintiff uses such terms in the Complaint.

6. Admits the allegations of paragraph 8 of the Complaint.

7. Is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 9 of the Complaint.

8. Denies each and every allegation of paragraph 10 of the Complaint.

9. Is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 11 of the Complaint.

10. Denies each and every allegation of paragraph 12 of the Complaint.

11. Is without knowledge or information sufficient to form a belief as to the truth of each and every allegation of paragraph 13 of the Complaint, except admits that certain concentrated phosphatic fertilizers were manufactured in plants of defendant International Minerals & Chemical Corporation located in the State of Florida and were on occasion shipped to Gulf Coast seaports for further transshipment by ship to Korea.

12. Denies each and every allegation of paragraphs 14, 15 and 16 of the Complaint.

13. Denies each and every allegation of paragraph 17 of the Complaint, except admits that CPEA is an export trade association formed under and operating pursuant to the Webb Export Trade Association Act, 40 Stat. 516 (15 U.S.C. 61 *et seq.*), and that its present membership consists

of American Cyanamid Company, W. R. Grace & Company, International Minerals & Chemical Corporation, Tennessee Corporation, and Socony Mobil Oil Company, Inc.

14. Denies each and every allegation of paragraphs 18, 19, 20 and 21 of the Complaint.

First Affirmative Defense

15. The Complaint fails to state a claim against the defendant International Minerals & Chemical Corporation upon which relief can be granted.

Second Affirmative Defense

16. The Complaint should be dismissed as to defendant International Minerals & Chemical Corporation because the Webb Export Trade Associations Act, 40 Stat. 516 (15 U.S.C. § 61 *et seq.*) grants primary jurisdiction to the Federal Trade Commission and further because the prerequisites of due process as required by the Act have not been complied with.

Third Affirmative Defense

17. The Complaint should be dismissed as to defendant International Minerals & Chemical Corporation because all of the acts complained of in the Complaint herein have been performed in full compliance with the authority and provisions of the Webb Export Trade Associations Act, 40 Stat. 516 (15 U.S.C. § 61 *et seq.*).

Fourth Affirmative Defense

18. The Complaint should be dismissed as to defendant International Minerals & Chemical Corporation because plaintiff is estopped from maintaining this action, and from claiming injunctive relief against defendant, because all of the acts complained of in the Complaint herein have been performed with the knowledge, acquiescence and active solicitation and encouragement of the plaintiff and its departments, branches and agencies, including among others the Federal Trade Commission, the Agency for International Development, the General Services Administration, and the Department of Commerce.

Prayer

WHEREFORE, defendant International Minerals & Chemical Corporation prays for judgment dismissing the Complaint as to it, together with its costs and disbursements, and prays for such other and further relief to defendant as the Court may deem just and proper.

Dated: New York, New York, August 9, 1965.

White & Case. By /s/ Haliburton Fales 2d, A Member of the Firm, Attorneys for Defendant, International Minerals & Chemical Corporation, 14 Wall Street, New York, New York 10005. Telephone RE 2-1040.

Filed August 13, 1965

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 64 Civil 3914

UNITED STATES OF AMERICA, Plaintiff,

v.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., AMERICAN CYANAMID COMPANY, W. R. GRACE & CO., INTERNATIONAL MINERALS & CHEMICAL CORPORATION, TENNESSEE CORPORATION and SOCONY MOBIL OIL COMPANY, INC., Defendants.

ANSWER

Defendant, Tennessee Corporation, by its attorneys, Guggenheimer & Untermyer, for its answer herein:

1. Denies each and every allegation contained in paragraph 1 of the complaint except that this action purports to be instituted under Section 4 of the Act of Congress of July 2, 1890 c.647, 26 Stat. 209 (15 U.S.C. § 4), as amended, commonly known as the Sherman Act.

2. As to paragraph 2 of the complaint admits that Tennessee Corporation transacts business within the Southern District of New York and admits on information and belief that each of the other defendants transacts business within the Southern District of New York.

3. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 3 of the complaint except admits that Concentrated Phosphate Export Association, Inc. (CPEA) and Tennessee Corporation are organized pursuant to and exist under the laws of the State of Delaware and have their principal places of business in New York, New York.

4. Admits the allegations contained in paragraph 4 of the complaint.

5. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 5 of the complaint.

6. Denies each and every allegation contained in paragraph 6 of the complaint except admits CPEA is a non-profit, membership corporation organized on or about September 12, 1961 and existing under the laws of the State of Delaware, whose membership consists of the remaining defendants, each of whom, or its corporate predecessor, was at all material times charged in the complaint engaged in the manufacture of concentrated phosphatic fertilizer products.

7. Admits the allegations contained in paragraph 7 of the complaint.

8. Admits the allegations contained in paragraph 8 of the complaint.

9. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 9 of the complaint.

10. Denies the allegations contained in paragraph 10 of the complaint.

11. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 11 of the complaint.

12. Denies the allegations contained in paragraph 12 of the complaint.

13. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 13 of the complaint.

14. Denies the allegations contained in paragraph 14 of the complaint.

15. Denies the allegations contained in paragraph 15 of the complaint.

16. Denies the allegations contained in paragraph 16 of the complaint.

17. Denies the allegations contained in paragraph 17 of the complaint.

18. Denies the allegations contained in paragraph 18 of the complaint.

19. Denies each and every allegation contained in paragraph 19 of the complaint except admits that after the formation of CPEA Tennessee Corporation did not submit individual bids for sales of concentrated phosphatic fertilizers to Korea.

20. Denies the allegations contained in paragraph 20 of the complaint.

21. Denies the allegations contained in paragraph 21 of the complaint.

First Affirmative Defense

22. The complaint fails to state a claim against Tennessee Corporation upon which relief can be granted.

Second Affirmative Defense

23. The complaint should be dismissed as to Tennessee Corporation because the transactions complained of in the complaint as constituting a violation of the Sherman Act (15 U.S.C. § 1 *et seq.*) come within the immunity from the antitrust laws provided by the Webb-Pomerene Act, 40 Stat. 516-517 (15 U.S.C. §§ 61-65).

Third Affirmative Defense

24. The complaint should be dismissed as to Tennessee Corporation for lack of jurisdiction because the Webb-Pomerene Act (15 U.S.C. §§ 61-65) grants primary jurisdiction to the Federal Trade Commission and further because the prerequisites of due process as required by the Act have not been complied with.

Fourth Affirmative Defense

25. The transactions referred to in the complaint were induced by agencies of the United States Government including the Federal Trade Commission, the Agency for International Development, the General Services Administration and other Federal agencies and were carried out with their participation, acquiescence and approval, such agencies having full knowledge at all times that CPEA was a Webb-Pomerene Act association and that the other defendants herein or their corporate predecessors were the members of CPEA.

26. Tennessee Corporation would not have engaged in any of the transactions questioned in the complaint except for the inducement, participation, acquiescence and approval of such agencies of the United States Government, and it is inequitable now for the Government to question such transactions.

Prayer

WHEREFORE, Tennessee Corporation demands judgment dismissing the complaint herein together with costs and disbursements and prays for such other and further relief as to the court may deem just and proper.

Dated: New York, N.Y., August 11, 1965.

Guggenheimer & Untermyer. By Randolph Guggenheimer, A Member of the Firm, 80 Pine Street, New York, N.Y. 10005, Attorneys for Defendant, Tennessee Corporation.

Filed August 23, 1966

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

64 Civil 3914

UNITED STATES OF AMERICA, Plaintiff,

v.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., AMERICAN CYANAMID COMPANY, W. R. GRACE & CO., INTERNATIONAL MINERALS & CHEMICAL CORPORATION, TENNESSEE CORPORATION and SOCONY MOBIL OIL COMPANY, INC., Defendants.

ORDER

IT IS HEREBY ORDERED THAT:

1. The attached Stipulation, dated August 22, 1966, together with the annexed Stipulation of Facts, and Exhibits therein referenced, dated August 19, 1966, are accepted and approved as the sole and entire record upon which the Court's decision of this case will be rendered; and

2. Plaintiff will file its brief on or before October 31, 1966; defendants will file their brief or briefs on or before January 16, 1967; plaintiff will file its reply brief on or before February 15, 1967; and a date for oral argument will be set thereafter by the Court.

Dated: August 23, 1966.

/s/ S. J. Ryan, Chief Judge.

A True Copy.

John J. Olean, Jr., Clerk. By —— ——, Deputy Clerk.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

64 Civil 3914

UNITED STATES OF AMERICA, Plaintiff,

v.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., AMERICAN CYANAMID COMPANY, W. R. GRACE & CO., INTERNATIONAL MINERALS & CHEMICAL CORPORATION, TENNESSEE CORPORATION and SOCONY MOBIL OIL COMPANY, INC., Defendants.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED on behalf of all the parties hereto that the above-entitled matter is submitted for determination and decision by the Honorable Sylvester J. Ryan, District Court Judge, upon the annexed Stipulation of Facts and Exhibits referenced therein. No application will be made by any party for the submission of any oral testimony, or additional exhibits or stipulations of fact.

Dated: August 22, 1966.

For the Plaintiff:

Burton R. Thorman, Attorney, Antitrust Division, Department of Justice, Washington, D. C.

For Defendants:

Marcus A. Hollabaugh. Hollabaugh & Jacobs, 910 17th Street, N. W., Washington, D. C., Attorneys for Defendant: The Concentrated Phosphate Export Association, Inc.

Samuel W. Murphy, Jr. Donovan, Leisure, Newton & Irvine, Two Wall Street, New York, New York, Attorneys for Defendant: American Cyanamid Company.

Lawrence J. McKay. Cahill, Gordon, Reindel & Ohl, 80 Pine Street, New York, New York, Attorneys for Defendant: W. R. Grace & Co.

Edgar W. Barten. White & Case, 14 Wall Street, New York, New York, Attorneys for Defendant: International Minerals & Chemical Corporation.

Randolph Guggenheimer. Guggenheimer & Untermyer, 80 Pine Street, New York, New York, Attorneys for Defendant: Tennessee Corporation.

John Bodner, Jr. Howrey, Simon, Baker & Murchison, 1707 H. Street, N. W., Washington, D.C., Attorneys for Defendant: Mobil Oil Corporation.

[1] UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

64 Civil 3914

UNITED STATES OF AMERICA, Plaintiff,

v.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., AMERICAN CYANAMID COMPANY, W. R. GRACE & CO., INTERNATIONAL MINERALS & CHEMICAL CORPORATION, TENNESSEE CORPORATION and SOCONY MOBIL OIL COMPANY, INC., Defendants.

STIPULATION OF FACTS

IT IS HEREBY STIPULATED AND AGREED on behalf of all parties hereto, solely for the purpose of this case, as follows:

THE ISSUE

1. The issue presented by the pleadings in this case is whether the Concentrated Phosphate Export Association, Inc., a non-profit membership corporation organized and operated under the Act of April 10, 1918, Ch. 50, 40 Stat. 516, 15 U.S.C. §61 (commonly known as the Webb-Pomerene Act), and its Members violated Section 1 of the Sherman Act (15 U.S.C. §1) in connection with that portion of the Association's sales of phosphatic fertilizer which such Association made for shipment to the Republic of Korea, where the Board of five Directors of the Association composed of one Director for each Member agreed on [2] selling prices and on allocation of sales among such Members, when United States Government foreign aid funds were made available to pay for said phosphatic fertilizer shipments in accordance with statutes, treaties and regulations applicable to the U. S. foreign aid program.

THE FACTS

Description of Defendants

2. Defendant Concentrated Phosphate Export Association, Inc., (CPEA), is a non-profit membership corporation, organized and existing under the laws of the State of Dela-

ware, with its principal place of business in New York, New York. By the terms of its Certificate of Incorporation (attached as Exhibit 1), CPEA was organized on or about September 12, 1961, to engage solely in export trade, as the term "export trade" is defined in the Webb-Pomerene Act, and specifically to engage in trade and commerce in the product known as triple superphosphate and certain other concentrated phosphatic materials. At all material times, CPEA has been duly registered with the Federal Trade Commission as an association organized and acting under the Webb-Pomerene Act.

3. CPEA's Members are W. R. Grace & Co.; Tennessee Corporation; Socony Mobil Oil Company, Inc.; and American Cyanamid Company. W. R. Grace & Co., Tennessee Corporation and American Cyanamid Company were original Members of CPEA. [3] Socony Mobil Oil Company, Inc., became a Member of CPEA by its acquisition on November 9, 1963, of Virginia-Carolina Chemical Corporation, one of CPEA's original Members. International Minerals & Chemical Corporation was a Member of CPEA from September, 1961, until June 30, 1966.

4. Defendant American Cyanamid Company is a corporation organized and existing under the laws of the State of Maine, with its administrative offices in Wayne, New Jersey. Cyanamid engages in diversified business activities, one of which involves, among other things, the mining and processing of phosphate rock, and the production of concentrated phosphates in Brewster, Florida. In 1964, Cyanamid had total sales in excess of $779,000,000 and assets of approximately $786,000,000.

5. Defendant W. R. Grace & Co. is a corporation organized and existing under the laws of the State of Connecticut, and its principal place of business is in New York, New York. Grace engages in diversified business activities, one of which involves, among other things, the mining and processing of phosphate rock, and the production of concentrated phosphates at Mulberry, Florida. In 1964, Grace had total sales of about $723,000,000 and assets of approximately $905,000,000.

6. Defendant International Minerals & Chemical Corporation is a corporation organized and existing under the [4] laws of the state of New York, and has its principal

place of business of Skokie, Illinois. IM&C engages in diversified business activities, one of which involves, among other things, the mining and processing of phosphate rock and the production of concentrated phosphates at plants in Florida. In 1964, IM&C had total sales of about $225,000,000 and assets of approximately $225,000,000.

7. Defendant Tennessee Corporation, a wholly-owned subsidiary of Cities Service Company, is a corporation organized and existing under the laws of the State of Delaware; and its principal place of business is in New York, New York. The present Tennessee Corporation is the successor to the original Tennessee Corporation which was one of the original Members of CPEA. Tennessee is engaged in diversified business activities, one of which involves, among other things, production of concentrated phosphates at East Tampa, Florida. In 1964, Tennessee had total sales of approximately $113,500,000 and assets of approximately $119,400,000.

8. Defendant Socony Mobil Oil Company, Inc., is a corporation organized and existing under the laws of the State of New York with its principal place of business in New York, New York. Socony is primarily a producer and seller of petroleum products; its 1964 sales totaled over four and a half billion dollars. Socony, through its Mobil Chemical [5] Company, is engaged in the mining and processing of phosphate rock and in production of concentrated phosphates at plants in Florida. On May 17, 1966, Socony changed its name to "Mobil Oil Corporation."

The Products Involved

9. The term "concentrated phosphates" as used herein, means triple superphosphate (TSP), ammonium phosphate, diammonium phosphate (DAP) or any other concentrated phosphatic material, whether liquid or solid, used as or for plant food, and containing in excess of 39 percent available phosphoric acid as determined by the procedures of the Association of Official Agricultural Chemists. DAP (in 18-46-0, nitrogen-phosphate-potash, formulation) was first offered for sale in commercial quantities in the United States in 1959 and was not until 1962 or 1963 available in large quantity from all concentrated phosphates producers.

10. The principal source of phosphorus used in fertilizer

is phosphate rock, a mined product. The concentrated phosphate products, which are the subject of the Complaint herein, are produced by treating phosphate rock chemically. Florida and Morocco have been the leading free-world sources for phosphate rock used in the production of concentrated phosphates.

[6] Operations of CPEA

11. At all times subsequent to the formation of CPEA as an export association, CPEA has been governed by a Board of Directors representing its Members in accordance with the Membership Agreements of the Association, dated September, 1961, and October, 1964, the latter incorporating all amendments prior thereto (copies attached as Exhibits 2 and 3), and the By-Laws of the Association (copy attached as Exhibit 4). Said Board of Directors has, at all times since the formation of CPEA, established the prices at which the Association has sold concentrated phosphates of the Membership and has allocated available business among the Members. After formation of CPEA, none of its Members bid as individuals on the Korean foreign aid procurements of concentrated phosphates here in suit.

12. As required by the provisions of the Webb-Pomerene Act, a Report of CPEA's formation was made to the Federal Trade Commission (FTC) on October 6, 1961; and copies of the Corporate Charter, By-Laws and Membership Agreements were filed with that Report. All amendments to the Charter and the Membership Agreements have been reported to the FTC. CPEA has also filed with the FTC Annual Reports for the years 1961 through 1965 in accord with provisions of the Webb-Pomerene Act, and has responded to FTC's requests for special [7] reports of, among other things, annual sales volume. In 1964, CPEA submitted to the FTC, at the Commission's request, a report which separately stated the dollar volume of CPEA's 1961-1962 sales believed to have been subject to AID financing. Plaintiff does not dispute the lawfulness of CPEA's operations under the Webb Act except as specifically stated in the issue set out at paragraph 1 hereof.

13. All material CPEA has sold has been for shipment directly to and consumption in foreign countries. Since September, 1961, CPEA has sold concentrated phosphates

for shipment directly to Iran, the Philippine Islands, Pakistan, Korea, India, Indonesia, Vietnam, Okinawa, Japan, Holland, France, Mexico, Brazil, Chile, Nigeria, South Africa, Algeria, Costa Rica, Egypt, Colombia, Aruba, El Salvador, Argentina, Dahomey, British Honduras, British West Indies, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Italy, Jamaica, Nicaragua, Panama, Peru, Uruguay, Venezuela, and Bolivia. In addition, CPEA has offered to sell and actively sought to sell for shipment directly to other countries, including Australia, Greece, Sweden, Iceland, Turkey, and other South and Central American countries. CPEA has faced world-wide competition for all sales except those where eligible sources were restricted under regulations noted below in paragraph 23. [8] 14. All of the concentrated phosphates sold by CPEA were manufactured in plants of its Members located in the State of Florida and then shipped directly to Florida seaports in the Tampa Range and placed aboard ocean-going vessels.

The U. S. Foreign Aid Program

15. As used herein:

A. "AID" means the Agency for International Development, an agency of the U. S. Department of State, established in 1961 pursuant to Executive Order No. 10973 [26 FR 10469 (1961)]. At all times material to this litigation, the U. S. foreign assistance programs have been administered by either AID or ICA.

B. "ICA" means the International Cooperation Administration, the predecessor agency of AID.

C. "OSROK" means the Office of Supply, Republic of Korea, the Korean governmental agency responsible for procurement of commodities for the Government of Korea.

16. Following World War II, the United States Government has made funds available to many countries to pay for commodities, including fertilizer, sold by commercial companies and shipped from the United States and other free-world sources to the recipient countries. Foreign aid funds have been made available from time to time both prior to and after 1961 to pay for various commodities such as

fertilizer, including [9] concentrated phosphates, for the Republic of Korea in accordance with:

(a) the several acts of Congress which established the United States foreign assistance programs, which are the Mutual Security Act of 1954, 68 Stat. 832, as amended (22 USC §1750 *et. seq.*), and the Foreign Assistance Acts of 1961-1965 (1961-PL 87-195, 75 Stat. 424; 1962-PL 87-565, 76 Stat. 255; 1963-PL 88-205, 77 Stat. 379; 1964-PL 88-633, 78 Stat. 1009; 1965-PL 89-171, 79 Stat. 653); and

(b) the treaties and agreements between the governments of the United States and Korea, and procedures adopted pursuant thereto, which are (i) a February 8, 1961 Economic, Technical and Related Assistance Agreement (copy attached as Exhibit 5) and the treaties and agreements referenced therein; (ii) a December 14, 1953 Combined Economic Board Agreement (copy attached as Exhibit 6); (iii) a December 29, 1953 Statement of Procurement Principles (copy attached as Exhibit 7); and (iv) Program Assistance Grant Agreement (FY 1966, #1), as amended (copy attached as Exhibit 8).

17. In the administration of the foreign aid program, ICA and AID, successively, have adopted regulations to [10] implement the foreign aid responsibilities assigned to those agencies. ICA Regulation No. 1 (copy attached as Exhibit 9) and AID Regulation No. 1, effective November 1, 1964 (copy attached as Exhibit 10), 22 CFR §201 *et. seq.*, applied to all commodity transactions financed by AID and have been in effect, successively, during the time material to this case.

18. AID financed procurements by OSROK of concentrated phosphates were made in accordance with the treaties, agreements, statutes and regulations described in paragraphs 16 and 17, and with Korean statutes and regulations, including OSROK General Provisions for Bidding (copy attached as Exhibit 11).

19. During each of the years involved in this case, Korea's imports have exceeded its exports, and Korea has maintained a substantial defense budget, both of which

factors have contributed to an imbalance in Korea's economy. During each of those years, Korea has received foreign assistance, mostly from the United States, but also from other free-world countries including West Germany and Japan, to finance a substantial portion of its total commodity imports and various capital projects.

20. During the years involved in this case, the United States Congress appropriated foreign aid funds annually after receiving recommendations from the U. S. State Department [11] and AID. AID's recommendations to Congress included a proposed budget for foreign aid assistance to separate world regions and countries, itemized to show annual expenditures tentatively proposed for development loans, commodity imports, and other elements of the total program for each region and country. AID made such recommendations to Congress on the basis of negotiations between representatives of the United States and countries requesting financial assistance, and, after considering, among other things, recommendations and reports from U. S. Government agencies, including the U. S. Departments of State and Defense, and detailed proposals for foreign aid expenditures prepared by AID's overseas missions after consultation with technical personnel of the governments of countries requesting foreign aid assistance. Funds appropriated by Congress for foreign aid have been made available by AID in the form of loans or grants in accordance with the applicable statutes, agreements, and regulations noted in paragraphs 16 and 17 above. Foreign aid funds have not been used to procure commodities for use or resale in the United States.

21. AID's budget for and allocation of funds to finance commodity imports for Korea were based on (1) estimates and projections made by various agencies of the Korean Government (including the Economic Planning Board, the [12] Ministry of Agricultural Finance, and the Bank of Korea) of Korea's total essential commodity import needs which Korea could not itself finance; (2) recommendations made by AID's overseas mission in Korea (USOM/K) which consulted with Korean Government officials and reviewed and evaluated their budget estimates; (3) the objectives and goals expressed in agreements between the United States and the Republic of Korea; and (4) United States foreign aid policy objectives. The expenditures of

funds AID allocated for Korean commodity imports was subject to AID's approval of "Procurement Authorization Applications" (PAA) (*e.g.*, Exhibits 12 and 30) submitted by agencies of the Korean Government to AID from time to time. AID's approval of Korean fertilizer procurements was made either in the form of a "Procurement Authorization" (PA) (*e.g.*, Exhibit 13) issued to OSROK or a "Procurement Authorization, U. S. Government Agency Purchase Requisition" (PA/PR) issued to GSA (*e.g.*, Exhibit 31). AID, in its official publications, is characterized as essentially a financing institution; AID did not itself procure any concentrated phosphates for Korea.

22. The AID-financed Korean procurements here in issue were financed by grants, as that term is used in the applicable statutes, treaties, agreements and regulations referred to in paragraphs 16 and 17 above. The Government [13] of Korea had no obligation to repay the amounts granted by the United States, but the concentrated phosphates procured with AID financing were sold to Korean consumers by a Korean Government agency and the Korean currency (hwan) received from such sales was deposited by the selling agency in an account at the Bank of Korea in accordance with agreements between the United States and Korean governments (Exhibits 5-8 inclusive). The Korean currency generated by such sales was not necessarily equal to the U. S. dollar value of the fertilizer sold. Such deposits were called "counterpart funds" and were used to support, in part, Korean and U. S. military establishments in Korea and for other purposes mutually agreed upon by the governments of the United States and Korea including financing public works projects of the Korean Government. The rights of the Governments of the United States and the Republic of Korea in and to such counterpart funds, including the uses to which such funds were put, are as set forth in Exhibits 5 through 8, inclusive.

23. All foreign aid procurements of concentrated phosphates for Korea made since September, 1961, were subject to either AID Geographic Code 898 or AID Geographic Code 901 which are designated "limited world-wide" codes, or AID Geographic Code 000, with modification. Under AID Geographic [14] Code 898, bidders were eligible who were located in any country in the world except the Communist Bloc, and Australia, Austria, Belgium, Canada, Den-

mark, France, Germany (Federal Republic), Hong Kong, Italy, Japan, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Union of South Africa, Sweden, Switzerland, and the United Kingdom. AID Geographic Code 901 is identical with Code 898 except that Hong Kong is an eligible source while Spain is an ineligible source. AID Geographic Code 000 includes the United States of America, its possessions, Puerto Rico and United States trust territories and, as modified, includes Taiwan, Philippines, Tunisia, and Morocco.

Korean Concentrated Phosphate Procurements

24. The following procurements of concentrated phosphates for shipment directly to and use by the Republic of Korea have been made since September, 1961:

1847–C	October	1961: Procuring agency, OSROK
2075–N	August	1962: Procuring agency, OSROK
29247–A&N	March & April	1963: Procuring agency, GSA
3057–N	July	1963: Procuring agency, OSROK
29849–A&N	March & April	1964: Procuring agency, GSA
4050–N	August	1964: Procuring agency, OSROK
4050–N	(Re-tender) Oct.	1964: Procuring agency, OSROK

[15] The following additional procurements were made after filing of the Complaint herein:

5009–N	April	1965: Procuring agency, OSROK
5066–N	July	1965: Procuring agency, OSROK
5094–N	September	1965: Procuring agency, OSROK
6011–N	April	1966: Procuring agency, OSROK

The concentrated phosphates purchased in each of these procurements and the costs of shipping were paid for with funds from the United States Government made available under its Foreign Assistance Program to the Government of Korea as explained in paragraph 16, *supra*.

25. The following procurements of concentrated phosphates for shipment directly to and use by the Republic of Korea did not involve the use of U. S. foreign aid funds:

2001–N	February	1962: Procuring agency, OSROK
2035–N	May	1962: Procuring agency, OSROK

2035-N was made with Korean foreign exchange funds, and 2001-N was financed out of a special twenty million dollar Stabilization Fund granted in 1961 by the United States to the Republic of Korea to meet Korea's need for foreign exchange and to offset the anticipated short-term reduction in Korea's dollar earnings resulting from Korea's major reform in 1961 of its monetary exchange system. Neither 2035-N nor 2001-N was subject to ICA or AID regulations; both were handled in [16] accordance with OSROK'S applicable procurement procedures (Exhibit 11). There were no restrictions on the Republic of Korea's use of the special Stabilization Fund, but representatives of the U. S. and Korean Governments did agree that such fund should be restricted to procurements at lowest competitive bid prices from limited world-wide sources, and that at least 50 percent of the products so procured would be shipped in U. S. vessels.

26. Invitations for bids and other pertinent procurement documents in each procurement listed in paragraphs 24 and 25 provided that the concentrated phosphates were to be shipped directly to the Republic of Korea; in procurements 1847-C, 2001-N, 2035-N and 2075-N, delivery by the seller to OSROK in Korea was required (C.I.F.) but in all other procurements, delivery to the vessel for shipment to OSROK in Korea was required (F.O.B. vessel). All material sold by CPEA under the foregoing procurements was delivered directly from Florida to Korea.

27. During the times material to the the Complaint herein, the Government of Korea normally purchased concentrated phosphates through its procurement agency, OSROK. The operative facts of such procurements are disclosed by Exhibits 12 through 28 attached hereto, which are typical of the documents utilized in all such procurements and which set forth [17] the contractual relationship typically found in such procurements.

28. In procurements 29247-A&N and 29849-A&N (listed in paragraph 24, *supra*), the General Services Administration (GSA) of the United States Government served as the procurement agency. Both said procurements were carried out in accordance with the applicable statutes, treaties, agreements and procurement regulations set forth in paragraphs 16 and 17, *supra*, and in accordance with a

memorandum agreement between ICA and GSA, dated July 1, 1957 (Exhibit 29). The operative facts of such procurements are disclosed by Exhibits 30 through 45, attached hereto, which are documents used in said procurements and which set forth the contractual relationships found in said procurements.

29. Webb associations other than CPEA have sold and are selling under the AID program and have sold under foreign aid programs administered by ICA (Exhibit 46). In addition, under different statutory and regulatory requirements, the U.S. Government has furnished funds to finance export sales of agricultural products by Webb associations under the Public Law 480 program administered by the United States Department of Agriculture. Webb associations sold, too, under the Lend-Lease program at least from 1941. Prior to September, 1961, concentrated phosphates produced by some of the companies [18] named defendants herein were sold by such companies acting individually for shipment directly to Korea under the AID program.

CPEA's Concentrated Phosphates Business

30. Concentrated phosphates manufactured by CPEA's Members were offered by CPEA in response to all but one of the invitations for bids issued in the transactions described above in paragraphs 24 and 25. Relevant data of such procurements, showing CPEA's and others' bids and awards, are summarized in Exhibit 47, attached hereto. All bids to OSROK for CPEA material were submitted in Seoul, Korea. CPEA's bids in response to Procurement Invitations 3057-N, 4050-N, 5066-N, and 6011-N were personally submitted to OSROK in Seoul, Korea by CPEA's General Manager. CPEA's executives have visited Korea periodically to consult with the Association's agronomic technician and other representatives in that country and with Korean Government officials responsible for fertilizer procurements.

31. Beginning in 1963 and at all times since then, CPEA has been and is represented in Korea by local Korean business organizations who have assisted CPEA in developing

its Korean business. These representatives have promoted and advertised CPEA's material, obtained data on Korean fertilizer requirements, consulted with officials of the Korean [19] procurement agency and other Korean agencies responsible for fertilizer purchases, and handled disputes under contracts between CPEA and OSROK. CPEA also is represented in Korea by an agronomic technician, who promotes and explains the use of phosphatic fertilizing material directly to Korean farmers.

32. CPEA has instituted several programs in Korea to demonstrate the benefits of concentrated phosphates directly to Korean farmers, such as conducting field demonstrations, distributing promotional literature and pictures, giving educational lectures to farmers' cooperatives, and otherwise supporting similar efforts by agricultural colleges and in government extension programs. CPEA's efforts have been designed to educate farmers to the importance of fertilizer use and have supplemented similar efforts made by AID and the Korean Government.

33. On each of the transactions listed above in paragraphs 24 and 25, invitations to enter competitive bidding were sent to CPEA and other potential bidders and bids from the Association invited thereby. Officials of AID, OSROK and GSA have been fully aware of CPEA's status as a Webb association, its membership, and the fact that CPEA's material was being offered for sale in response to invitations to bid to supply phosphatic materials for shipment directly to Korea. [20] No CPEA material has been sold for shipment directly to Korea except pursuant to invitations to bid.

34. CPEA has directly competed for AID-financed sales to Korea with domestic and eligible foreign producers of concentrated phosphates. Typically, prior to the issuance of invitations for bids, Korean Government agencies chose which of various grades and concentrations of phosphates should be procured, subject to AID's approval of the Procurement Authorization Application. Sellers of concentrated phosphates, including CPEA, are at this stage also in competition with domestic and eligible foreign producers of low analysis phosphates.

35. After its formation in September, 1961, CPEA's sales

of concentrated phosphates in metric tons and dollar value to CPEA were:

CPEA Sales

Year	Total Sales M/T	Total Sales Value	AID-Financed Sales to Korea M/T	AID-Financed Sales to Korea Value
1961	28,951	$ 1,606,824	28,951	$ 1,606,824
1962	253,846	13,872,257	141,876	7,762,794
1963	435,818	23,053,750	238,333	12,135,606
1964	407,588	26,031,212	209,571	14,292,352
1965	317,662	18,839,396	140,449	7,952,003

[21] 36. In the years 1962 through 1965, CPEA made sales in countries other than Korea to foreign purchasers eligible to use AID financing. In such transactions, CPEA competed against companies located in countries outside AID's "limited world-wide" area, which companies would not have been eligible to bid on Korean procurements here in issue. Some contracts awarded to those suppliers, including CPEA, located within the AID "limited world-wide" area have been financed with AID funds, but all applicable provisions of AID Regulation 1 had to be met. In these transactions, AID made no prior commitment to finance, but AID financing was arranged after the contracts were awarded. AID financing was not available, however, for contracts awarded to suppliers which were ineligible under the AID "limited world-wide" code.

37. In the years 1961 (from CPEA's formation in September, 1961), 1963, and 1964, AID financed all of Korea's purchases from CPEA; but in 1962, Korea did not finance through AID its purchase from CPEA of 81,966 metric tons of phosphatic materials having a dollar value to CPEA of $4,378,703 (referred to in paragraph 25, above). CPEA's total sales to Korea during that year were 223,842 metric tons and $12,141,497.

38. In 1962 Korea procured concentrated phosphates with its own foreign exchange, and requested and accepted bids from suppliers in any free world country (referred to in [22] paragraph 25, above). CUF, Guano-Werke, Windmill, Albatros, and SIAPE are all foreign companies, identified below in paragraph 40, and all bid through a common broker, which submitted separate bids for each supplier.

Awards were made to CPEA (10,000 m/t), Armour (5,000 m/t), CUF (12,770 m/t), and Guano-Werke (2,000 m/t).

Competitive Suppliers of Concentrated Phosphates

39. In the United States there are a number of companies, in addition to CPEA's members, engaged in producing and marketing concentrated phosphates. All of the U.S. producers have been and are eligible to bid on all AID-financed procurements of concentrated phosphates in Korea and elsewhere, and the following have offered concentrated phosphates on AID-financed Korean invitations:

(1) *Armour & Co.* is a corporation organized and existing under the laws of the State of Delaware and its principal place of business is in Illinois. Armour is engaged in diversified business activities, one of which involves, among other things, the production of concentrated phosphates in Bartow, Florida. In 1964 Armour had total sales of approximately $1,887,000,000 and assets of approximately $503,000,000.

[23] (2) *Swift & Co.* is a corporation organized and existing under the laws of the State of Illinois and its principal place of busines is in Illinois. Swift is engaged in diversified business activities, one of which involves, among other things, the production of concentrated phosphates. In 1964 Swift had total sales of approximately $1,574,000,000 and assets of approximately $678,500,000.

(3) *Stauffer Chemical Corp.* is a corporation organized and existing under the laws of the State of Delaware and its principal place of business is in New York. Stauffer is engaged in diversified business activities, one of which involves, among other things, the production of concentrated phosphates. In 1964 Stauffer had total sales of approximately $279,000,000 and assets of approximately $289,000,000.

(4) *Continental Oil Co.* is a corporation organized and existing under the laws of the State of Delaware and its principal place of business is in New York. Continental is engaged in diversified business

activities [24] and through its American Agricultural Chemical Division mines and processes phosphate rock and produces concentrated phosphates at Ft. Pierce, Florida. In 1964 Continental had total sales of approximately $1,402,000,000 and assets of approximately $1,554,000,000.

(5) *Hooker Chemical Co.* is a corporation organized and existing under the laws of the State of New York and its principal place of business is in New York. Hooker is engaged in diversified business activities, and through its subsidiary, The National Phosphate Co., produces concentrated phosphates. In 1964 Hooker had total sales of approximately $211,000,000 and assets of approximately $257,000,000.

(6) *Monsanto Chemical Co.* is a corporation organized and existing under the laws of the State of Delaware and its principal place of business is in Missouri. Monsanto is engaged in diversified business activities, one of which involves, among other things, the production of concentrated phosphates. In 1964 Monsanto had total sales of approximately
[25] $1,358,000,000 and assets of approximately $1,535,000,000.

(7) *Olin Mathieson Chemical Co.* is a corporation organized and existing under the laws of the State of Virginia and its principal place of business is in New York. Olin is engaged in diversified business activities, one of which involves, among other things, the production of concentrated phosphates. In 1964 Olin had total sales of approximately $815,000,000 and assets of approximately $960,000,000.

(8) *Borden Co.* is a corporation organized and existing under the laws of the State of New Jersey and its principal place of business is in New York. Borden is engaged in diversified business activities, and through its Smith-Douglass Division mines phosphate rock and produces concentrated phosphates in Florida. In 1964 Borden had total sales of approximately $1,293,000,000 and assets of approximately $676,000,000.

(9) *Standard Oil of California* is a corporation orga-

nized and existing under the laws of [26] the State of Delaware and its principal place of business is in California. Standard is engaged in diversified business activities, and through its Chevron Chemical Division markets concentrated phosphates. In 1964 Standard had total sales of approximately $2,285,000,000 and assets of approximately $3,795,000,000.

(10) *Columbia Nitrogen Co.* is a corporation organized and existing under the laws of the State of Pennsylvania and its principal place of busines is in Pennsylvania. Columbia is a subsidiary of the Pittsburgh Plate Glass Co. and engages in diversified business activities, one of which involves, among other things, the production of concentrated phosphates.

(11) *J. R. Simplot & Co.* is a corporation organized and existing under the laws of the State of Nevada and its principal place of business is in Idaho. Simplot is a privately held company engaged in diversified business activities, one of which involves, among other things, the mining and processing of phosphate rock and the [27] production of concentrated phosphates. In 1964 Simplot had total sales of over $70,000,000 and assets of approximately $37,760,000.

(12) *F. S. Royster Guano* is a corporation organized and existing under the laws of the State of Virginia with its principal place of business in Virginia. Royster is a privately held company engaged in diversified business activities, one of which involves, among other things, the production of concentrated phosphates at Mulberry, Florida. In 1964 F. S. Royster had total sales of at least $25,000,000 and assets of approximately $37,000,000.

(13) *Coastal Chemical Co.* is a corporation organized and existing under the laws of the State of Mississippi and its principal place of business is in Mississippi. Coastal is a co-operative engaged in diversified business activities, one of which involves, among other things, the production of concentrated phosphates. In 1964 Coastal had total sales of over $38,400,000 and assets of approximately $37,000,000.

[28] (14) *First Mississippi Corporation* is a corporation organized and existing under the laws of the State

of Mississippi, with its principal place of business in Mississippi. The company holds a stock interest in Coastal Chemical Company and is itself primarily a holding company but does directly engage in diversified business activities, one of which involves, among other things, the production of concentrated phosphates. In 1964 First Mississippi had total sales of about $3,000,000 and assets of approximately $6,800,000.

(15) *Occidental Petroleum Corporation* is a corporation organized and existing under the laws of the State of California with its principal place of business in California. Occidental is engaged in diversified business activities including the production of concentrated phosphates in Florida. In 1964 Occidental had total sales of about $43,000,000 and assets of approximately $113,000,000.

(16) *Kaiser Steel Corp.* is a corporation organized and existing under the laws of the [29] State of Delaware and its principal place of business is in California. Kaiser is engaged in diversified business activities, one of which involves, among other things, the production of concentrated phosphates. In 1964 Kaiser had total sales of approximately $282,000,000 and assets of approximately $433,000,000.

(17) *Southern Nitrogen* is a corporation organized and existing under the laws of the State of Delaware and its principal place of business is in Georgia. Southern is engaged in diversified business activities, one of which involves, among other things, the marketing of concentrated phosphates. In 1964 Southern had total sales of approximately $39,000,000 and assets of approximately $15,000,000.

(18) *Shell Oil Co.* is a corporation organized and existing under the laws of the State of Virginia and its principal place of business is in New York. Shell is engaged in diversified business activities, one of which involves, among other things, the marketing of [30] concentrated phosphates. In 1964 Shell had total sales of approximately $2,332,000,000 and assets of approximately $2,301,000,000.

(19) *Central Farmers, Inc.* is a cooperative associa-

tion organized and existing under the laws of the State of Illinois and its principal place of business is in Illinois. Central is engaged in diversified business activities, one of which involves, among other things, the production of concentrated phosphates in Florida. In 1961 Central had total sales of approximately $52,000,000 and assets of approximately $28,000,000.

(20) *Emhart Corp.* is a corporation organized and existing under the laws of the State of Connecticut with its principal place of business in Connecticut. Emhart is engaged in diversified business activities and through its Wilson & Toomer subsidiary markets concentrated phosphates. In 1964 Emhart had total sales of approximately $193,000,000 and assets of approximately $140,000,000.

(21) *Deere & Company* is a corporation organized and existing under the laws of the State of [31] Delaware and its principal place of business is in Illinois. Deere is engaged in diversified business activities, one of which involved, among other things, the production of concentrated phosphates. In 1964 Deere had total sales of approximately $816,000,000 and assets of approximately $883,000,000.

40. Outside the United States there are many major companies which produce and sell for export concentrated phosphates, of which companies, those located in Portugal, Tunisia and Morocco, producing from major world rock deposits (Morocco's being the world's largest and most highly concentrated), have at all times been eligible to bid on AID-financed Korean procurements, except that companies located in Portugal were not eligible to bid on Procurement 6011–N. On the Korean Invitations noted above in paragraphs 24 and 25, concentrated phosphates produced by one or more of the following foreign companies have been bid:

(1) *Soc. Inc. d'Acide Phosphorique et d'Engrais* (SIAPE) (Sfax, Tunisia) has bid and sold concentrated phosphates in AID-financed Korean procurements.

(2) *NPK Engrais S. A. T.* (NPK) (Sfax, Tunisia) has bid and sold concentrated phosphates in AID-financed Korean procurements.

[32] (3) *Cia. Uniaco Fabril* (CUF) (Barreiro, Portugal) has bid and sold concentrated phosphates in AID-financed Korean Procurements. CUF is a diversified company which operates its own shipping lines, and it is the largest industrial concern in Portugal.

(4) *Office Cherifien des Phosphates/Maroc Chimie* (Safi, Morocco) has bid and sold concentrated phosphates in AID-financed Korean procurements.

(5) *Fertilizantes del Istmo* (Minatitian, Mexico) has bid on AID-financed Korean procurements.

(6) *Guanos y Fertilizantes* (Coatzacoalcos, Mexico) has bid on AID-financed Korean procurements.

(7) *Guano-Werke* (Germany) sold concentrated phosphates on one non-AID-financed procurement in 1962.

(8) *Mekog-Albatros N.V.* (Pernis, Netherlands), a company jointly owned by German and Dutch chemical companies, in 1962 bid on one non-AID-financed Korean procurement.

(9) *E.N.C.K. (Windmill) & Delta Chemie* (Vlaardingen, Netherlands) in 1962 bid on one non-AID-financed Korean procurement.

(10) *S.A.P.E.C.* (Portugal) bid on one AID-financed Korean procurement in 1962.

[33] 41. Some North African and Mexican concentrated phosphates producers are partially or wholly government owned, and some have ownership ties to phosphate producers in other countries. SIAPE's stock, for example, is owned indirectly to the extent of about 41% by the Government of Tunisia, 11.6% by Fisons, Ltd. of Great Britain, 3.3% by Albatros and 3.3% by Windmill, of Holland. About 40% of its stock is publicly held in Tunisia. NPK is partly owned by Forenade, a Swedish phosphate producer and a U.S. corporation, Freeport Sulfur Co.

42. AID is directly assisting efforts involving U.S. companies, foreign companies, and foreign governments to build fertilizer plants in underdeveloped nations. AID

participates in these ventures by undertaking surveys, supplying financing, and making investment guarantees. AID has guaranteed fertilizer plant investments in Korea, India, Nicaragua and Morocco. Concentrated phosphate producers, particularly in North Africa but in other underdeveloped countries as well, have financed construction and expansion of their production facilities with funds loaned or granted under U.S. foreign assistance programs. The U.S. foreign aid program is a major source for the funds supporting efforts by other developing nations, including Chile and Brazil, in planning or constructing facilities to produce fertilizer, including concentrated phosphates.

[34]. 43. AID has financed construction of two fertilizer plants in Korea. The combined output of these facilities, along with another Korean fertilizer plant which was substantially AID-financed and one financed by West German interests, is expected to supply a major part of the Republic of Korea's requirements for fertilizer, including concentrated phosphates.

44. The developing nations face serious problems in producing sufficient food for rapidly expanding populations, and most are substantially increasing imports of fertilizers, including concentrated phosphates, as well as planning to construct facilities in their own countries to produce phosphatic and other fertilizers. A significant source of funds with which some of these nations have purchased and plan to purchase fertilizers is the U.S. foreign aid program.

The undersigned parties agree that the facts set forth above, together with the exhibits annexed hereto, include all facts necessary to the determination by this Honorable Court of the ISSUE stated in paragraph 1 hereof or of defendants' affirmative defenses set out in their respective Answers to the Complaint filed herein, which are hereby expressly reserved. Further, the undersigned parties [35-36] expressly reserve for argument and briefs questions concerning relevance or materiality of the facts stipulated above to the ISSUE stated in paragraph 1 hereof or to any affirmative defense.

Dated. August 19, 1966.

For the Plaintiff:

Burton R. Thorman, Attorney, Antitrust Division, Department of Justice, Washington, D.C.

For Defendants:

Marcus S. Hollabaugh, Hollabaugh & Jacobs, 910 17th Street, N.W., Washington, D.C., Attorneys for Defendant: The Concentrated Phosphate Export Association, Inc.

Samuel W. Murphy, Jr., Donovan, Leisure, Newton & Irvine, Two Wall Street, New York, New York, Attorneys for Defendant: American Cyanamid Company.

Leonard McKay, Cahill, Gordon, Reindel & Ohl, 80 Pine Street, New York, Attorneys for Defendant: W. R. Grace & Co.

Edgar O. Barten, White & Case, 14 Wall Street, New York, New York, Attorneys for Defendant: International Minerals & Chemical Corporation.

Randolph Guggenheimer, Guggenheimer & Untermyer, 80 Pine Street, New York, New York, Attorneys for Defendant: Tennessee Corporation.

J. R. Bodner, Jr., Howrey, Simon, Baker & Murchison, 1707 H Street, N.W., Washington, D.C., Attorneys for Defendant: Mobil Oil Corporation.

EXHIBIT 1

CERTIFICATE OF INCORPORATION
of
CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC.

FIRST: The name of the Association is CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC.

SECOND: The location of its principal office in the state of Delaware is at No. 229 South State Street, in the City of Dover, county of Kent. The name of its resident agent is The Prentice-Hall Corporation System, Inc., whose address is No. 229 South State Street in that city.

THIRD: The nature of the business and the objects and purposes to be transacted, promoted or carried on by the Association are:

To engage solely in export trade, as the term "export trade" is defined in the Act of Congress entitled "An act to promote export trade, and for other purposes," approved April 10, 1918, commonly known as the "Webb Act," and any Acts amendatory thereof or supplementary thereto, conducting business so that after providing for its necessary and reasonable expenses the Association shall earn no profit, and in connection with such export trade to do any and all things necessary and incidental thereto, including the following, subject always to said Webb Act and any and all Acts now or hereafter amendatory thereof or supplementary thereto.

(1) To engage in trade and commerce in triple superphosphate or any other concentrated phosphatic material, whether liquid or solid, containing in excess of 39% Available Phosphoric Acid, which is for export or is to be exported or is in the course of being exported from the United States to any foreign nation. ~~except any nation in the Western Hemisphere and except India.~~*

(2) To buy or otherwise acquire, sell, exchange, contract for, transport, store and otherwise deal in, triple superphosphate, or any other concentrated phosphatic

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* Deleted by amendment, August 24, 1962.

material, for its own account or for the account of its members, for the purpose of carrying on such export trade.

(3) To establish and maintain agencies and sub-agencies, and to employ agents, sub-agents and other representatives in [38] the United States and in all parts of the world for the purpose of carrying on such export trade.

(4) To purchase, lease, charter, sub-charter, acquire, construct, equip, operate, manage and maintain offices, warehouses, elevators, vessels, docks and other plant and equipment necessary or convenient for use in carrying on such export trade.

(5) To enter into and perform with any person, firm, association, corporation, municipality, body politic, county, territory, state, government, colony or dependency, contracts of every kind for any lawful purpose necessary or convenient in carrying on the export business of the Association.

(6) To borrow or raise monies for any of the purposes of the Association and, from time to time, without limit as to amount, to draw, make, accept, endorse, discount, execute and issue promissory notes, drafts, bills of exchange, warrants, bonds, debentures, and other negotiable or non negotiable instruments and evidences of indebtedness and to secure the payment of any thereof and of the interest thereon by mortgage upon, or pledge, conveyance or assignment in trust of the whole or any part of the property of the Association, whether at the time owned or thereafter acquired, and to sell, pledge or otherwise dispose of such bonds or other obligations of this Association for its corporate purposes.

(7) To carry out all or any part of the foregoing objects as principal, factor, agent, contractor, or otherwise, either alone or in connection with any person, firm, association or corporation.

(8) To do all and everything necessary, suitable and proper for the attainment of any of the purposes, the accomplishment of any of the objects, or the furtherance of any of the powers hereinbefore set forth; and to have, enjoy and exercise any and all rights, powers

and privileges which are now or which may be hereafter conferred upon corporations organized under the laws of the State of Delaware as they now exist or may be amended or supplemented.

In the course of the export business of the Association, to exercise all or any of its corporate powers, rights and privileges, in the State of Delaware, in other states, the District of Columbia, the territories, colonies and possessions of the United States and in foreign countries, and for this purpose to have and [39] maintain such number of offices and agencies within and without the State of Delaware as may be convenient.

The foregoing clauses shall be construed as purposes, objects and powers and it is hereby expressly provided that the enumeration of specific powers shall not be held to limit or restrict in any manner the powers of this Association; Provided, however, that the same shall be in all respects subject to, and governed by, and not inconsistent with, the laws under which this Association is organized and the Act of Congress entitled "An Act to promote export trade, and for other purposes", approved April 10, 1918, commonly known as the "Webb Act", and any Acts amendatory thereof or supplementary thereto, and any and all lawful orders and regulations of the Federal Trade Commission thereunder.

FOURTH: The Association is not organized for profit and shall have no capital stock.

FIFTH: The names and places of residence of each of the Incorporators, are as follows:

Names	Residences
N. S. Truax	229 South State Street, Dover, Delaware
J. A. Kent	229 South State Street, Dover, Delaware
Z. A. Pool, III	229 South State Street, Dover, Delaware

SIXTH: The Association is to have perpetual existence.

SEVENTH: The private property of the incorporators, members, directors and officers of the Association shall not be subject to the payment of the debts of the Association to any extent whatever.

EIGHTH: Conditions of membership of the Association shall be as stated in the by-laws of the Association.

NINTH: In the event of the liquidation, dissolution or winding up of the Association, whether voluntary or involuntary, its assets remaining after the payment and discharge of its debts and liabilities shall be [40] distributed among the members of the Association at the time of its dissolution in such reasonable manner as the Board of Directors shall direct, except as otherwise provided by law.

TENTH: Subject to further provisions in the by-laws, the members shall elect a Board of Directors in whom shall be vested the management of the affairs of the Association. The number of directors, the manner of their election, their tenure of office, the place, times and conduct of their meetings and their duties and powers shall, except as otherwise provided in this Certificate of Incorporation, be prescribed in the by-laws.

ELEVENTH: In furtherance and not in limitation of the powers conferred by law, the Board of Directors is expressly authorized:

To make, alter and amend any by-laws and to alter and repeal any by-laws so made by the Board of Directors.

To borrow money in the name of the Association and to authorize and cause to be executed mortgages and liens without limit as to amount, upon real and personal property of the Association.

In addition to the powers and authorities heretobefore or by statute expressly conferred upon them, to exercise all such powers and do all such acts and things as may be exercised or done by the Association subject, nevertheless, to the provisions of the statutes of Delaware, of this certificate, and to the by-laws.

TWELFTH: In the absence of actual fraud, no contract or other transaction between this Association and any other corporation and no act of this Association shall in any way be affected or invalidated by the fact that any of the directors of this Association are pecuniarily or otherwise interested in, or are directors, officers, agents or employees of, or stockholders, or otherwise financially interested, directly or indirectly, in such other corporation. Any director of this Association who is also a director, officer, agent or employee of, or a stockholder, or otherwise financially in-

terested, directly or indirectly, in such other corporation, or who is a member, agent or employee of, or otherwise directly or indirectly financially interested in such firm may be counted [41] in determining the existence of a quorum at any meeting of the Board of Directors of this Association which shall authorize any such contract or transaction and may vote thereat to authorize any such contract or transaction, with like force and effect as if he were not such director, officer, agent or employee, of, or a stockholder, or otherwise financially interested in such other corporation, or not a member, agent or employee of, or otherwise financially interested in, such firm.

THIRTEENTH: Both members and directors shall have power to hold their meetings within and/or without the State of Delaware, and to keep the books of this Association (subject to the provisions of the statutes) outside of the State of Delaware at such places as may be from time to time designated by the Board of Directors.

FOURTEENTH: The Association may at any meeting of its Board of Directors, sell, lease, or exchange all of its property, or any substantial part thereof, upon such terms and conditions as its Board of Directors deem expedient and for the best interests of the Association, when and as authorized by the affirmative vote of a majority of the members given at a member's meeting duly called for that purpose, or when authorized by the written consent of a majority of the members.

The Association may by its by-laws confer upon the Directors and officers powers and authorities additional to those expressly conferred upon them by law and by this certificate.

FIFTEENTH: This Association reserves the right to amend, alter, change, add to or repeal any provision contained in this certificate of incorporation in the manner now or hereafter prescribed by the laws of the State of Delaware.

SIXTEENTH: Any person made a party to any action, suit or proceeding by reason of the fact that he, his testator or intestate, is or was a director, officer or employee of the Association or of any corporation which he served as such at the request of the Association, shall be indemnified by the Association against the reasonable expenses including attorneys' fees, actually and necessarily incurred by him in

connection [42] with the defense of such action, suit or proceeding, or in connection with any appeal therein except in relation to matters as to which it shall be adjudged in such action, suit or proceeding that such officer, director or employee is liable for negligence or misconduct in the performance of his duties. Such right of indemnification shall not be deemed exclusive of any other rights to which such director, officer or employee may be entitled.

IN WITNESS WHEREOF, we have made, signed and acknowledged this Certificate of Incorporation this 12th day of September, 1961.

N. S. TRUAX, (L.S.) J. A. KENT, (L.S.).
Z. A. POOL, III (L.S.)

[43-49] STATE OF DELAWARE
COUNTY OF KENT, SS.:

BE IT REMEMBERED That on this 12th day of September A. D. 1961 personally came before me F. Kenneth Tuller a Notary Public in and for the County and State aforesaid, N. S. Traux, J. A. Kent and Z. A. Pool, III, parties to the foregoing certificate of incorporation, known to me personally, to be such, and severally acknowledged the said certificate to be the act and deed of the signers respectively, and that the facts therein stated are truly set forth.

GIVEN under my hand and seal of office the day and year aforesaid.

F. KENNETH TULLER

(NOTARIAL SEAL)

[50] EXHIBIT 3

CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC.

MEMBERSHIP AGREEMENT.

AGREEMENT made as of the day of , 19, , between , a corporation organized and existing under the laws of (hereinafter called "Member") and CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., a corporation organized and existing under the laws of Delaware (hereinafter called the "Association").

WITNESSETH:

WHEREAS the Association has been formed as a non-profit corporation to engage solely in export trade as defined by act of Congress entitled "An Act to Promote Export Trade, and for other Purposes," approved April 10, 1918, commonly known as the "Webb Act," and any act or acts amendatory thereof or supplementary thereto, and

WHEREAS the Member is engaged in producing phosphatic materials (as hereinafter defined) and on the day of , 1961, entered into an Agreement (hereinafter referred to as the "1961 Agreement") with the Association, which Agreement is now in effect, and

WHEREAS at or about the same time certain other producers of phosphatic material became Members of the Association by entering into Agreements (hereinafter referred to as the "1961 Agreements") with the Association substantially identical to the 1961 Agreement between the Member and the Association, and

WHEREAS all Members of the Association have agreed to amend the 1961 Agreements referred to hereinabove, and the Member does by execution of this Agreement agree to such amendments;

NOW, THEREFORE, in consideration of the execution by all other Association Members of Agreements substantially identical to this Agreement and the mutual covenants and agreements herein contained, it is agreed as follows:

[51] FIRST: Whenever used in this Agreement, the term "phosphatic materials" or "phosphates" shall mean triple

superphosphate or any other concentrated phosphatic material, whether liquid or solid, used as or for plant food, and containing in excess of 39% Available Phosphoric Acid as determined by procedures of the Association of Official Agricultural Chemists; the term "Association Phosphates" shall mean any phosphatic materials which are to be or are in the course of being exported by any Member of the Association in accordance with the provisions of this Agreement and the other Membership Agreements from the United States or any territory thereof to any foreign nation or nations, country or countries, except Canada, for sale or delivery to any person, firm, association, corporation, or other entity located therein; the terms "Member of the Association" and/or "Member" shall mean a producer (including the Member) which has entered into or shall hereafter enter into an agreement with the Association substantially identical to this Agreement; the term "Affiliated Company" shall mean any organization which is engaged in manufacture and sale of phosphatic materials of whose voting or other capital stock any Member of the Association owns at least ten per cent; the term "Managing Director" shall mean the individual appointed by the Board of Directors of the Association (hereinafter called the "Board of Directors") to be the principal full-time officer of the Association; the term "year" shall mean a twelve-month period ending on the 30th day of June.

SECOND: This Agreement shall bind the parties and their respective successors up to the 30th day of June, 1965, and thereafter from year to year, unless sooner canceled on consent of both parties hereto; provided, however, that the Member or the Association may terminate this Agreement effective June 30th of any year by giving notice to the other, in writing, of its election to do so at least ninety (90) days prior thereto. Such termination shall not affect, however, any obligation undertaken by either the Member or the Association pursuant to the terms of this Agreement prior to such termination.

THIRD: The Association shall purchase Association Phosphates from the Member but only for exportation to a foreign nation or country. No Member of the Association shall sell phosphatic materials [52] to any foreign government, person, firm, association, or other entity other than to or

on behalf of the Association; provided, however, that nothing herein contained shall be deemed or construed to prohibit any Member from selling phosphatic materials and/or phosphates, or any other material, to any domestic person, firm, association, or other entity for any purpose whatsoever; and provided further, however, that nothing herein contained shall prohibit any Member of the Association from selling or shipping directly to an Affiliated Company any phosphatic materials and/or phosphates, or any other material, for raw materials to be used in manufacture of fertilizer in the Affiliated Company's own plant facilities, and any sales or shipments so made shall not be charged against a Member's percentage quota of Association Phosphate shipments.

FOURTH: In furtherance of its obligations hereunder, the Association may exercise the powers and shall conduct itself in the manner set forth in its Certificate of Incorporation and By-Laws (copies of which, in their present form, are attached hereto) which shall be amended only as provided therein. It may sell Association Phosphates at such prices and upon such terms and conditions as shall be determined by it in its discretion, subject to any limitations imposed by the Board of Directors from time to time and subject to the specific limitations herein contained.

FIFTH: The Association shall make sales, as far as practicable, with consideration for established trademarks of the Members of the Association and may issue reasonable instructions as to the delivery, quality, grading, packing, marking and shipping; and the Member agrees to use its best efforts to comply with all such instructions of the Association.

SIXTH: It is the intention of the Members of the Association that each of them shall participate in sales of Association Phosphates in the following manner:

(a) Each sale shall be apportioned among the Members according to the proportion which each Member's capacity for the production of phosphoric acid (H_3PO_4) basis 100% P_2O_5 bears to the total of such capacity for all Members; provided, however, that [53] sales of Association Phosphates may be made by a Member without prior apportionment in accordance with the provisions of subparagraph (c) hereof.

(b) Within a reasonable time prior to the submission of any offer for the sale of any Association Phosphates by the Association, the Managing Director or General Manager shall advise the Members of the quantity of phosphatic material to be sold and the price and terms of sale which he intends to submit on behalf of the Association. Pursuant to the provisions of the Membership Agreements, the Managing Director or General Manager shall promptly advise each Member of its proportionate share of such sale under the provisions of this Article. Within two (2) consecutive business days of receipt of such notification or prior to the announced date for submission of the offer, whichever is earlier, any Member who does not wish to supply his proportionate share at the indicated price and terms shall so notify the Managing Director or General Manager, whereupon he shall distribute the share, or any portion thereof, so refused, among those other Members of the Association which are willing to accept same, in accordance with the principles set forth in subparagraph (a) above. Failure of a Member to so notify the Association during the period referred to above shall be deemed a rejection. No Member is obligated to sell phosphatic material to the Association beyond the amount which the Member specifically agrees to supply.

(c) Any Member who sells Association Phosphates on behalf of the Association shall sell such phosphatic material at prices and upon such terms and conditions as shall be determined by the Board of Directors from time to time. Any such sale of phosphatic material as Association Phosphates by a Member shall be charged as soon as possible against that Member's percentage quota of succeeding shipments by the Association of similar material in which the Member participates.

SEVENTH: On or before January 1 and July 1 of each year during which this Agreement is in effect, each Member shall deliver to the Managing Director or General Manager, in confidence, a statement sworn to by an officer or other representative of said Member setting forth in full detail its over-all capacity for the production of phosphoric acid (H_3PO_4) basis 100% P_2O_5 as of such date of signing and as

of such January 1 or July 1. The Managing Director or General Manager shall thereupon compute as to each Member of the Asso- [54] ciation the percentage which its production capacity is of the production capacity of all Members of the Association taken together.

EIGHTH: On or before January 1 and July 1 of each year during which this Agreement is in effect, the Board of Directors shall approve a semiannual operating budget for the Association and shall assess each Member its pro rata share thereof based upon its proportion of production capacity as computed in Article SEVENTH above. In addition, and based upon the same computation, each Member shall, when requested by the Board of Directors to do so, pay in advance to the Association; but no Member shall be required to advance in any six-month period an additional amount in excess of such Member's pro rata share of the operating budget for that period. Any company on first joining the Association shall upon the execution of a Membership Agreement pay an Entrance Fee of Ten Thousand Dollars ($10,000) and, in addition, pay its proportionate share of the current operating budget in accordance with the foregoing formula. At the end of each year, all funds remaining after all Association expenses have been paid shall, at the discretion of the Board of Directors, be remitted to the Members in proportion to the assessments paid and advances made by each Member or applied to the operating budget for the next succeeding periods.

NINTH: The Managing Director or General Manager shall make all offers on behalf of the Association for the sale of Association Phosphates except as otherwise provided for in Article SIXTH (a) and (c) hereinabove. No Association Phosphates shall be sold by the Association at a price less than the latest established minimum price as established by the Board of Directors from time to time. Whenever a Member has agreed to sell Association Phosphates to the Association, such Member shall sell its proportionate share to the Association at such price as the Board of Directors shall establish from time to time.

All sales of Association Phosphates by the Association shall be on terms of confirmed irrevocable sight letters of credit unless in a particular case the Board of Directors shall agree in advance to other terms. The Member shall be paid its proportionate share of the net proceeds for all

phosphates sold to the Association promptly after payment has been received by the Association from its customer.

[55] TENTH: Each party shall keep full and accurate records as to export shipments and all other transactions hereunder; and, except as to information supplied by the Members to the Association on a confidential basis, and except as to the information concerning the percentages of, or tonnage allotted to, or shipments made by any other Member of the Association, all such records, together with all orders, contracts, invoices, correspondence and other data pertaining to sale or shipment of Association Phosphates, shall at all reasonable business hours be open to inspection by certified public accountants designated and employed by the other party hereto so far as may be necessary or proper for the purpose of determining whether or not the terms of this Agreement have been or are being complied with. In addition, at the request and expense of the Member, a firm of public accountants acceptable to the Member and to the Managing Director (provided that such acceptance shall not be unreasonably withheld) shall be appointed to examine all records of the Association and to give its opinion whether allocations hereunder are being made as provided herein.

ELEVENTH: On or before the first day of February, 1965, and each six months thereafter, the Association shall render to the Member a semiannual statement of the Association's transactions and business in the previous semiannual calendar period and shall promptly render to the Member, in the manner and at the time prescribed by the Board of Directors, a summary of export transactions entered into by the Association.

TWELFTH: The Association agrees that it will not discriminate between the Member and other Members in respect of specifications, reports, information or other matters arising in the performance of this Agreement.

THIRTEENTH: Upon the breach of any of the provisions of the Agreement by the Member, the Board of Directors of the Association may, by resolution, declare this Agreement terminated and upon such termination shall declare forfeited to the Association all rights of the Member as a Member of the Association. The remedy of termination by the Association shall be in addition to any rights or remedies

which may be exercised by the Association under any other clauses of para- [56] graphs of this Agreement and any rights or remedies to which the Association may be entitled at law for damages or in equity for injunction or specific performance. Without in any way limiting the rights and remedies of the Association hereinbefore in this Article THIRTEENTH stated, upon any such forfeiture any tonnage allocated to such Member which shall not yet have been shipped by it for export hereunder may be allocated by the Association among such of the remaining Members as may wish to participate under the procedure established by Article SIXTH above.

FOURTEENTH: The performance by the parties hereto of their respective obligations hereunder shall be subject to *force majeure* to the extent the Association's contracts with its customers are subject to *force majeure*. The term "*force majeure*" shall include strikes, fires, floods, explosions, breakdowns, unavoidable accidents, wars, insurrections, acts of God, governmental demands, regulations and requirements, and other causes or contingencies, whether or not of the character above specified, outside the control of such party.

FIFTEENTH: The Member agrees that it will not pay or offer to any agent or sub-agent employed by the Association, or any person, firm or corporation engaged by the Association in the sale or distribution of Association Phosphates, any commissions, gratuities or other compensation for advertising, recommending or otherwise promoting the sale of phosphatic materials sold by the Member to the Association.

SIXTEENTH: Any written notice hereunder may be given by postpaid registered letter deposited in the United States mail addressed to the party at the address set opposite its name below, or at such other address as it may hereafter designate by notice in writing to the other party, or by delivery of a written notice at such address. The deposit of such letter in the mail or the delivery of said written notice at such address shall constitute giving notice hereunder:

To the MEMBER at:

To the ASSOCIATION at: 420 Lexington Avenue
New York, New York 10017

[57-68] SEVENTEENTH: This Agreement is not assignable. In case of the merger, consolidation or reorganization of the Member, however, the corporation resulting from such transaction shall thereafter, without further action on its part, succeed to all the rights and duties of the Member hereunder.

EIGHTEENTH: The Member agrees: (1) that Directors of the Association shall be nominated in accord with the Association's By-Laws; (2) that, whenever a vacancy occurs in the Board of Directors through the death, resignation, or removal of a Director, the Member of the Association which nominated such Director shall be entitled to nominate a successor; and (3) that it will vote at the annual election of Directors and at any election of a Director to fill a vacancy for any Director nominated pursuant to the foregoing by any Member of the Association, and that, in addition, it will vote for the Managing Director employed by the Board of Directors as an additional Director.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed under their respective corporate seals, by their officers thereunto duly authorized, the date and year first above set forth.

——, ——, By ——, ——.

Attest:

——, ——.

Concentrated Phosphate Export Association, Inc.
By ——, ——.

Attest:

——, ——.

[69]

EXHIBIT 5

REPUBLIC OF KOREA

Economic, Technical and Related Assistance

Agreements effected by exchanges of notes
Signed at Seoul February 8, 1961;
Entered into force February 28, 1961.
With agreed minute.

The American Ambassador to the Korean Minister of Foreign Affairs

SEOUL, *February 8, 1961.*

No. 878

EXCELLENCY:

I have the honor to refer to recent conversations between representatives of the Government of the United States of America and the Government of the Republic of Korea regarding the understandings applicable to economic, technical and related assistance furnished by the Government of the United States to the Government of the Republic of Korea and to propose that henceforth these understandings shall be as follows:

1) The Government of the United States and the Government of the Republic of Korea jointly reaffirm that economic, technical and related assistance is an essential requirement for the achievement of the paramount objective of maintaining the defense of the Republic of Korea, consistent with the purposes and principles of the United Nations.

2) The Government of the United States will furnish such economic, technical and related assistance hereunder as may be requested by representatives of appropriate agencies of the Government of the Republic of Korea and approved by representatives of the agency designated by the Government of the United States to administer its responsibilities under this Agreement, or as may be requested and approved by other representatives designated by our

two Governments. The furnishing of such assistance shall be subject to applicable United States laws and regulations. It shall be made available in accordance with arrangements agreed upon between the above-mentioned representatives.

[70] 3) The Government of the Republic of Korea reaffirms the undertakings expressed in the Mutual Defense Treaty between the United States of America and the Republic of Korea which was signed at Washington on October 1, 1953, and entered into force on November 17, 1954,[1] the Mutual Defense Assistance Agreement signed at Seoul on January 26, 1950,[2] and the Agreement effected by an exchange of notes signed at Pusan on January 4 and 7, 1952;[3] will make the full contribution permitted by its manpower, resources, facilities and general economic condition in furtherance of the purposes for which such assistance is made available; will take appropriate steps to assure the effective use of such assistance; will cooperate with the Government of the United States to assure that procurement will be at reasonable prices and on reasonable terms; will, without restriction, permit continuous observation and review by United States representatives of programs and operations hereunder, and records pertaining thereto; will provide the United States with full and complete information concerning such programs and operations and other relevant information which the Government of the United States may need to determine the nature and scope of operations and to evaluate the effectiveness of the assistance furnished or contemplated; and will give to the people of the Republic of Korea full publicity concerning programs hereunder. With respect to cooperative technical assistance programs hereunder, the Government of the Republic of Korea will also bear a fair share of the costs thereof; will, to the maximum extent possible, seek full coordination and integration of technical cooperation programs being carried on in the Republic of Korea; and will cooperate with other nations participating in such programs in the mutual exchange of technical knowledge and skills.

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[1] TIAS 3097; 5 UST, pt. 3, p. 2368.

[2] TIAS 2019; 1 UST 137.

[3] TIAS 2612; 8 UST, pt. 4, p. 4619.

4) In any case where commodities or services are furnished on a grant basis under arrangements which will result in the accrual of proceeds to the Government of the Republic of Korea from the import or sale of such commodities or services, the Government of the Republic of Korea, except as may otherwise be mutually agreed by the representatives referred to in paragraph 2, will establish in its own name a Special Account in the Bank of Korea, will deposit promptly in such Special Account the amount of local currency equivalent to such proceeds and, upon notification from time to time by the Government of the United States of its local currency requirements, will make available to the Government of the United States, in the manner requested by that Government, out of any balances in the Special Account, such sums as are stated in such notifications to [71] be necessary for such requirements. The Government of the Republic of Korea may draw upon any remaining balances in the Special Account for such purposes beneficial to the Republic of Korea as may be agreed upon from time to time by the representatives referred to in paragraph 2. Any unencumbered balances of funds which remain in the Special Account upon termination of assistance hereunder to the Government of the Republic of Korea shall be disposed or for such purposes as, subject to approval by act or joint resolution of the Congress of the United States, may be agreed upon by the representatives referred to in paragraph 2.

5) The Government of the Republic of Korea will receive a special mission, and its personnel, which will discharge the responsibilities of the Government of the United States hereunder. Upon appropriate notification by the Government of the United States, the Government of the Republic of Korea will consider this special mission and its personnel as part of the diplomatic mission of the United States in the Republic of Korea for the purposes of enjoying the privileges and immunities accorded to that mission and its personnel of comparable grade or rank. The Government of the Republic of Korea will give full cooperation to the special mission, and its personnel, including the furnishing of facilities necessary for the purposes of carrying out the provisions of this Agreement.

6) In order to assure the maximum benefits to the people

of the Republic of Korea from the assistance to be furnished hereunder:

(a) Any supplies, materials, equipment or commodities, including motor vehicles, or any funds introduced into or acquired in the Republic of Korea by the Government of the United States, or any contractor financed by that Government, for purposes of any program or project conducted pursuant to this Agreement shall, while such supplies, materials, equipment, commodities or funds are used in connection with such a program or project, be exempt from any taxes on ownership or use of property, and any other taxes, investment or deposit requirements and currency controls in the Republic of Korea. The import, export (except that in the case of contractors financed by the Government of the United States export transactions shall be the subject of special arrangements between the representatives referred to in paragraph 2 hereof), purchase, use or disposition (other than by sale by a contractor financed by the Government of the United States) of any such supplies, materials, equipment, commodities, including motor vehicles, or funds in connection with such a program or project shall be exempt from any tariffs, customs duties, import and export taxes, taxes on purchase or disposition (other than by sale by a contractor financed by the Government of the United States) of property, and any other taxes or similar charges in the Republic of Korea.

[72] (b) All personnel, except citizens and permanent residents of the Republic of Korea, including employees of the Government of the United States or its agencies who are present in the Republic of Korea to perform work in connection herewith shall be exempt from income and social security taxes levied under the laws of the Republic of Korea with respect to income upon which they are obligated to pay income or social security taxes to the Government of the United States, and from taxes on purchase, ownership, use or disposition of personal movable property, including motor vehicles, intended for their own use. Such personnel and members of their families shall receive the same treatment, but in no case treatment more favorable,

with respect to the payment of customs and import and export duties on personal effects, equipment, supplies or commodities, including motor vehicles, imported into the Republic of Korea for their own use as is accorded by the Government of the Republic of Korea to diplomatic personnel of the American Embassy in Seoul.

(c) Funds introduced into the Republic of Korea for purposes of furnishing assistance hereunder shall be convertible into currency of the Republic of Korea at the highest rate in terms of the number of Korean hwan per United States dollar which, at the time the conversion is made, is not unlawful in the Republic of Korea.

7) All or any part of the program of assistance provided hereunder may be terminated by the Government of the United States if it determines that because of changed conditions the continuation of such assistance is unnecessary or undesirable. The termination of such assistance under this provision may include the termination of deliveries of any commodities hereunder not yet delivered.

8) The agreements applicable to economic, technical, or related assistance furnished directly by the Government of the United States to the Government of the Republic of Korea, or through the United Command, which are superseded in whole or part by this Agreement shall be specified in supplementary arrangements made between the representatives referred to in paragraph 2 hereof.

I have the honor to propose that, if these understandings are acceptable to the Government of the Republic of Korea, the present note and your reply note concurring therein shall constitute an Agreement between our two Governments which shall enter into force on the date of notification[1] by the Government of the Republic of Korea to the United States Embassy in Seoul of the consent thereto by the National Assembly of the Republic of Korea, and which shall remain in force until thirty days after the receipt by either Government of written notification of the intention of the other to terminate [73] it, it being understood, however, that the provisions of this Agreement shall remain

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[1] Feb. 28, 1961.

in full force and effect with respect to assistance furnished pursuant to requests made under paragraph 2 hereof.

Accept, Excellency, the renewed assurances of my highest consideration.

Walter P. McConaughy.

His Excellency

Yil Hyung Chyung, Minister of Foreign Affairs, Seoul.

The Korean Minister of Foreign Affairs to the American Ambassador

REPUBLIC OF KOREA

MINISTRY OF FOREIGN AFFAIRS

PT-9401 February 8, 1961.

EXCELLENCY:

I have the honor to refer to Your Excellency's note dated February 8, 1961 which reads as follows:

"I have the honor to refer to recent conversations between representatives of the Government of the United States of America and the Government of the Republic of Korea regarding the understandings applicable to economic, technical and related assistance furnished by the Government of the United States to the Government of the Republic of Korea and to propose that henceforth these understandings shall be as follows:

"1) The Government of the United States and the Government of the Republic of Korea jointly reaffirm that economic, technical and related assistance is an essential requirement for the achievement of the paramount objective of maintaining the defense of the Republic of Korea, consistent with the purposes and principles of the United Nations.

"2) The Government of the United States will furnish such economic, technical and related assistance hereunder as may be requested by representatives of appropriate agencies of the Government of the Republic of Korea and approved by representative of the agency designated by the Government of the United States to administer its responsibilities under this Agreement, or as may be requested and

approved by other representatives designated by our two Governments. The furnishing of such assistance shall be subject to applicable United States laws and regulations. It shall be made available in accordance with arrangements agreed upon between the above-mentioned representatives.

[74] "3). The Government of the Republic of Korea reaffirms the undertakings expressed in the Mutual Defense Treaty between the United States of America and the Republic of Korea which was signed at Washington on October 1, 1953, and entered into force on November 17, 1954, the Mutual Defense Assistance Agreement signed at Seoul on January 26, 1950, and the Agreement effected by an exchange of notes signed at Pusan on January 4 and 7, 1952; will make the full contribution permitted by its manpower, resources, facilities and general economic condition in furtherance of the purposes for which such assistance is made available; will take appropriate steps to assure the effective use of such assistance; will cooperate with the Government of the United States to assure that procurement will be at reasonable prices and on reasonable terms; will, without restriction, permit continuous observation and review by United States representatives of programs and operations hereunder, and records pertaining thereto; will provide the United States with full and complete information concerning such programs and operations and other relevant information which the Government of the United States may need to determine the nature and scope of operations and to evaluate the effectiveness of the assistance furnished or contemplated; and will give to the people of the Republic of Korea full publicity concerning programs hereunder. With respect to cooperative technical assistance programs hereunder, the Government of the Republic of Korea will also bear a fair share of the costs thereof; will, to the maximum extent possible, seek full coordination and integration of technical cooperation programs being carried on in the Republic of Korea; and will cooperate with other nations participating in such programs in the mutual exchange of technical knowledge and skills.

"4) In any case where commodities or services are furnished on a grant basis under arrangements which will result in the accrual of proceeds to the Government of the Republic of Korea from the import or sale of such com-

modities or services, the Government of the Republic of Korea, except as may otherwise be mutually agreed by the representatives referred to in paragraph 2, will establish in its own name a Special Account in the Bank of Korea, will deposit promptly in such Special Account the amount of local currency equivalent to such proceeds and, upon notification from time to time by the Government of the United States of its local currency requirements, will make available to the Government of the United States, in the manner requested by that Government, out of any balances in the Special Account, such sums as are stated in such notifications to be necessary for such requirements. The Government of the Republic of Korea may draw upon any remaining balances in the Special Account for such purposes beneficial to the Republic of Korea as may be agreed upon from time to time by the representatives referred to in paragraph 2. Any unencumbered balances of [75] funds which remain in the Special Account upon termination of assistance hereunder to the Government of the Republic of Korea shall be disposed of for such purposes as, subject to approval by act or joint resolution of the Congress of the United States, may be agreed upon by the representatives referred to in paragraph 2.

"5) The Government of the Republic of Korea will receive a special mission, and its personnel, which will discharge the responsibilities of the Government of the United States hereunder. Upon appropriate notification by the Government of the United States, the Government of the Republic of Korea will consider this special mission and its personnel as part of the diplomatic mission of the United States in the Republic of Korea for the purposes of enjoying the privileges and immunities accorded to that mission and its personnel of comparable grade or rank. The Government of the Republic of Korea will give full cooperation to the special mission, and its personnel, including the furnishing of facilities necessary for the purposes of carrying out the provisions of the Agreement.

"6) In order to assure the maximum benefits to the people of the Republic of Korea from the assistance to be furnished hereunder:

(a) Any supplies, materials, equipment or commodities, including motor vehicles, or any funds introduced

into or acquired in the Republic of Korea by the Government of the United States, or any contractor financed by that Government, for purposes of any program or project conducted pursuant to this Agreement shall, while such supplies, materials, equipment, commodities or funds are used in connection with such a program or project, be exempt from any taxes on ownership or use of property, and any other taxes, investment /or deposit requirements and currency controls in the Republic of Korea. The import, export, (except that in the case of contractors financed by the Government of the United States export transactions shall be the subject of special arrangements between the representatives referred to in paragraph 2 hereof) purchase, use or disposition (other than by sale by a contractor financed by the Government of the United States) of any such supplies, materials, equipment, commodities, including motor vehicles, or funds in connection with such a program or project shall be exempt from any tariffs, customs duties, import and export taxes, taxes on purchase or disposition (other than by sale by a contractor financed by the Government of the United States) of property, and any other taxes or similar charges in the Republic of Korea.

(b) All personnel, except citizens and permanent residents of the Republic of Korea, including employees of the Government of the United States or its agencies who are present in the Republic of Korea to perform work in connection herewith shall be exempt from income and social security taxes levied under the laws of the [76] Republic of Korea with respect to income upon which they are obligated to pay income or social security taxes to the Government of the United States, and from taxes on purchase, ownership, use or disposition of personal movable property, including motor vehicles, intended for their own use. Such personnel and members of their families shall receive the same treatment but in no case treatment more favorable, with respect to the payment of customs and import and export duties on personal effects, equipment, supplies or commodities, including motor vehicles, imported into Korea for their own use as is accorded by the Government of

the Republic of Korea to diplomatic personnel of the American Embassy in Seoul.

(c) Funds introduced into the Republic of Korea for purposes of furnishing assistance hereunder shall be convertible into currency of the Republic of Korea, at the highest rate in terms of the number of Korean hwan per United States dollar which, at the time the conversion is made, is not unlawful in the Republic of Korea.

"7) All or any part of the program of assistance provided hereunder may be terminated by the Government of the United States if it determines that because of changed conditions the continuation of such assistance is unnecessary or undesirable. The termination of such assistance under this provision may include the termination of deliveries of any commodities hereunder not yet delivered.

"8) The agreements applicable to economic, technical, or related assistance furnished directly by the Government of the United States to the Government of the Republic of Korea, or through the Unified Command, which are superseded in whole or part by this agreement shall be specified in supplementary arrangements made between the representativs referred to in paragraph 2 hereof.

I have the honor to propose that, if these understandings are acceptable to the Government of the Republic of Korea, the present note and your reply note concurring therein shall constitute an Agreement between our two Governments which shall enter into force on the date of notification by the Government of the Republic of Korea to the United States Embassy in Seoul of the consent thereto by the National Assembly of the Republic of Korea, and which shall remain in force until thirty days after the receipt by either Government of written notification of the intention of the other to terminate it, it being undersood, however, that the provisions of this Agreement shall remain in full force and effect with respect to assistance furnished pursuant to requests made under paragraph 2 hereof.

"Accept, Excellency, the renewed assurances of my highest consideration."

[77] I have the honor to inform Your Excellency that the understandings set forth in your note are acceptable to the

Government of the Republic of Korea and that your note and the present reply will constitute an agreement between the two Governments.

Please accept, Excellency, the renewed assurances of my highest consideration.

Y. H. Chyung.

His Excellency

Walter P. McConaughy, Ambassador of the United States of America, Seoul.

AGREED MINUTE

Pursuant to paragraph 8 of the Agreement effected by the exchange of notes, dated February 8, 1961, the Governments of the United States of America and the Republic of Korea agree that the Agreement on Aid between the United States of America and the Republic of Korea signed at Seoul on December 10, 1948,[1] as amended; the Agreement on Economic Coordination between the Republic of Korea and the United States acting as the Unified Command, and the accompanying exchange of notes and minutes, signed at Pusan on May 24, 1952,[2] as amended; and the Agreement between the United Nations Command Economic Coordinator and the Prime Minister of the Republic of Korea entitled "Combined Economic Board Agreement for a Program of Economic Reconstruction and Financial Stabilization," with Annexes, signed at Seoul on December 14, 1953, are superseded by the Agreement effected by the exchange of notes, dated February 8, 1961.

[78] It is agreed, however, that paragraph 13 of Article III of the above-mentioned Agreement on Economic Coordination shall be the subject of separate arrangements.

For the Government of the United States of America:

Walter P. McConaughy, Ambassador of the United States of America to the Republic of Korea.

For the Government of the Republic of Korea:

Yil Hyung Chyung, Minister of Foreign Affairs of the Republic of Korea.

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[1] TIAS 1908; 62 Stat., pt. 3, p. 3780.
[2] TIAS 2593; 3 UST, pt. 3, p. 4420.

The American Ambassador to the Korean Minister of Foreign Affairs

No. 880 SEOUL, *February 8, 1961.*

EXCELLENCY:

I have the honor to refer to the Agreed Minute to the Agreement effected by the exchange of notes, dated February 8, 1961, between the Governments of the United States of America and the Republic of Korea and to propose that until amended by mutual agreement between the United States of America and the Republic of Korea, the privileges, immunities and facilities envisaged by paragraph 13, Article III, of the Agreement on Economic Coordination between the Republic of Korea and the United States acting as the Unified Command, of May 24, 1952, as amended, shall continue to be accorded individuals and agencies of the United Nations Command.

I have the honor to propose that, if these undertakings are acceptable to the Government of the Republic of Korea, the present note and your reply note concurring therein shall constitute an agreement between our two Governments.

Accept, Excellency, the renewed assurances of my highest consideration.

Walter P. McConaughy.

His Excellency

Yil Hyung Chyung, Minister of Foreign Affairs, Seoul.

[79-80] *The Korean Minister of Foreign Affairs to the American Ambassador*

REPUBLIC OF KOREA

MINISTRY OF FOREIGN AFFAIRS

PT-9402 February 8, 1961

EXCELLENCY:

I have the honor to refer to Your Excellency's note dated February 8, 1961 which reads as follows:

"I have the honor to refer to the agreed minute to the agreement effected by the exchange of notes, dated Febru-

ary 8, 1961 between the Governments of the United States of America and the Republic of Korea and to propose that until amended by mutual agreement between the United States of America and the Republic of Korea, the privileges, immunities and facilities envisaged by paragraph 13, Article III, of the Agreement on Economic Coordination between the Republic of Korea and the United States acting as the Unified Command of May 24, 1952, as amended, shall continue to be accorded individuals and agencies of the United Nations Command.

"I have the honor to propose that, if these undertakings are acceptable to the Government of the Republic of Korea, the present note and your reply note concurring therein shall constitute an agreement between our two Governments.

"Accept, Excellency, the renewed assurances of my highest consideration."

I have the honor to inform your Excellency that the undertakings set forth in your note are acceptable to the Government of the Republic of Korea and to confirm that your note and the present reply will constitute an agreement between our two Governments.

Please accept, Excellency, the renewed assurances of my highest consideration.

Y. H. Chyung.

His Excellency

Walter P. McConaughy, Ambassador of the United States of America, Seoul.

[81] December 14, 1953

EXHIBIT 6

COMBINED ECONOMIC BOARD AGREEMENT

for

A PROGRAM OF ECONOMIC RECONSTRUCTION

and

FINANCIAL STABILIZATION

A Program of Economic Reconstruction and Financial Stabilization shall be designed to make a maximum contribution towards expanding and strengthening the Korean economy. The UNC member of the Combined Economic Board is impressed with the needs of the Korean economy. Assuming, as both members of the Combined Economic Board confidently expect, the full cooperation which has characterized the association of the Republic of Korea and the United States of America, both in this recovery program and in all our other relationships, and provided also that the need for funds can be justified, the UNC member, on his part, pledges his best efforts to obtain such aid funds as are required for the achievement of the basic objectives of this program. The ROK member of the Combined Economic Board, on his part, pledges his best efforts to cause the maximum amount of Korean funds to be used in support of the common undertaking to achieve reconstruction and rehabilitation of the Korean economy.

As in all the relations between the Republic of Korea and the United States of America, the program will be carried out with full mutual respect for sovereign rights.

Within the limits of funds available, the Combined Economic Board will endeavor to ensure that obligations are made as expeditiously as possible and that the procurement, actual arrival, and distribution of goods are expedited as much as possible.

In order to raise the planned investment in the program to the highest level consistent with financial stability, all endeavors will be made to keep the deficit in the ROK War Account budget, which is due to the heavy defense expenditures, at a minimum through careful screening of expendi-

tures and the adoption of measures designed to increase tax and other revenues, and to reduce the relief element in the aid program. Investments will be programmed in such a manner that, due regard having been given to the importance of selecting essential investments, all efforts will be made for the maximum feasible share of the total cost to be borne by funds derived from such current income, profits, and savings as are available in accordance with Annex A.

The Government of the Republic of Korea has established the official exchange rate of 180 hwan per U.S. dollar. The Government of the Republic of Korea and the Government of the United States of America have agreed to cooperate fully within the framework of the economic reconstruction and financial stabilization program, to prevent further inflation and to create stable economic and financial conditions in Korea.

Counterpart deposits at a rate of 180 hwan per U.S. dollar will be made by the Government of the Republic of Korea for all aid goods and services which arrive on or after August 28, 1953. An amount not exceeding five percent of the amount cumulatively deposited, except as the Combined Economic Board may approve a higher percentage, shall be released from the counterpart account for local expenses of the UN/US organizations administering the aid program. The remainder of the counterpart fund will be administered by the Combined Economic Board with a view of covering the legitimate financial needs of programmed investments as well as of covering eligible expenditure items in the ROK War Account budget and for such other purposes as may be agreed. It is understood that decisions concerning the use of that part of the counterpart fund which is generated by UNKRA financed imports will be subject to the approval of the Agent General of UNKRA.

[82] The Government of the Republic of Korea has decided to limit the expansion of credit granted by the Bank of Korea and the commercial banks to an annual amount of hwan 5 billion, except for credit granted for the purpose of making counterpart deposits and credit extended from the counterpart fund. It is presently estimated that the total credit expansion which can take place through the banking system without endangering financial and economic stability would be at the rate of hwan 11 billion in the coming twelve months. This magnitude of credit expansion together with

the utilization of Korean and aid funds is designed to make possible an increased level of industrial recovery and reconstruction and at the same time to preserve essential financial stability.

Mutually satisfactory procurement arrangements now being developed will be instituted and announced shortly. These will include suitable arrangements to enable enterprises to utilize FOA funds for the purpose of acquiring necessary plant, materials and machines.

The pricing of aid goods and services offered for sale in Korea shall be directed at maximizing collections from these sales in accordance with the principles set forth in Annex B.

All funds collected from the sale of aid goods that arrive on or after August 28, 1953, will be deposited in a collection account with the exception of those amounts needed for meeting the cost of internal distribution of such goods. The collection account will be used to reduce the indebtedness of the Government of the Republic of Korea to the Bank of Korea and for such other purposes as may be agreed upon.

This program will be carried out by skillful and vigorous action as the actual course of developments unfolds. Flexibility in administering the program will be combined with the firm resolution to achieve the goals of the program. Prior to the actual initiation of the programmed projects, the Combined Economic Board will determine whether they retain their original economic usefulness and financial feasibility in the light of subsequent developments.

The quantitative implications of the program are now being developed.

The Economic Coordination Agreement of 1952 and the Economic Aid Agreement of 1948 shall be amended in accordance with Annex C.

Signed in duplicate original this fourteenth day of December, 1953, at Seoul, Korea

S/ Too Chin Paik. Paik, Too Chin, Prime Minister, Republic of Korea.

S/ C. Tyler Wood, UNC Economic Coordinator.

Annex A

Financing the Investment Program

1. The Combined Economic Board is agreed that the greatest possible portion of the total cost of programmed investment shall be contributed by enterprises from their own funds or savings rather than from credit. This policy principle is a requirement of the investment program in order to ensure its consistency with the attainment of financial stabilization during the current program period.

2. In order to attain this objective, it is agreed that in the assignment of individual investment projects preference will be given to enterprises which are able to contribute the largest share of the total project costs from their own funds or savings. As a general rule no enterprise will be eligible for assignment of a new investment project within the program unless it can provide an agreed minimum proportion of the total cost of the project from savings.

3. The Combined Economic Board shall, on the basis of recommendations of the appropriate Combined Economic Board committees, devise detailed procedures for implementing these principles and review the progress of financing the investment program. It is agreed that significant shortfalls in the proportion of savings obtained for financing the investment program will require adjustment in the volume of investment goods imported under the program in order to maintain balance with other elements of the financial stabilization program.

FORMULATION OF PRICING POLICY

1. The Combined Economic Board shall accept as a basic principle in formulation of pricing policy the desirability of moving as rapidly as feasible in the direction of price determination through the operation of free market forces.

2. Aid goods from all sources which are offered for sale in Korea shall be sold at prices approximating those of similar items in the free market, but not less than prices reflecting the hwan value of the dollar landed cost converted at the established exchange rate plus all costs of internal distribution. As exceptions, the Combined Economic Board may in its discretion temporarily permit prices of certain aid goods to reflect less than the commensurate hwan value of the dollar landed cost converted at the established exchange rate, where such action will contribute to the achievement of important program objectives. It is understood that, whenever deemed necessary, aid goods may be sold by auction sale.

3. In all cases, the internal distribution costs of imported aid goods, except of those distributed free as relief goods, will be borne by the ultimate consumer as an element of the price he pays, additional to the element of the price representing the converted dollar landed cost. The proceeds of the sale of aid goods less costs of internal distribution shall be deposited in the Collection Account, which shall be used for reducing the indebtedness of the Government of the Republic of Korea to the Bank of Korea and for such other purposes as may be agreed upon. The hwan costs of distributing aid goods as relief may be financed within the ROK budget by authorized releases from the counterpart fund.

4. The Combined Economic Board, on the basis of recommendations submitted by the appropriate committees, shall establish accounting and other procedures to assure attainment of these objectives. It is agreed that significant shortfalls in collections will require review of the investment program in light of the attainment of financial stabilization.

5. The Combined Economic Board shall accept as a primary objective the reduction and ultimate elimination at

the earliest feasible date of exceptions agreed to under the provisions of paragraph 2 above, and shall instruct the appropriate Combined Economic Board committees to study and make recommendations designed to attain this objective.

[85] ANNEX C

AMENDMENT OF THE ECONOMIC COORDINATION AGREEMENT OF 24 MAY 1952 AND THE ECONOMIC AID AGREEMENT OF 10 DECEMBER 1948

The following provision is to be substituted for Article III 7 *c* and *d* of the Economic Coordination Agreement of 24 May 1952 and the counterpart provisions of the Economic Aid Agreement of 10 December 1948:

(a) The provisions of this Section shall apply only with respect to assistance which may be furnished by the Government of the United States of America on a grant basis.

(b) The Government of the Republic of Korea will establish a special account in the Bank of Korea in the name of the Government of the Republic of Korea (hereinafter called the Special Account) and will make deposits in hwan to this account as follows: Amounts commensurate with the indicated dollar cost to the Government of the United States of America of economic and technical assistance (including any dollar cost of processing, storing, transporting, repairing, or other services incident to the furnishing thereof) made available to the Republic of Korea on a grant basis under these Agreements which arrive on or after August 28, 1953. The Government of the United States of America shall from time to time indicate to the Government of the Republic of Korea the dollar cost of any such assistance, and the Government of the Republic of Korea will, upon notification, deposit in the Special Account a commensurate amount of hwan computed at an agreed rate of exchange.

(c) The Government of the Republic of Korea shall deposit, upon receipt, in an account in the Bank of Korea to be called the Aid Goods Collections Account, the local currency accruing to it net of hwan internal distribution costs from the sale of commodities or services supplied under these Agreements, or otherwise accruing to it as a result of the import of such commodities or services. Funds deposited in the Aid Goods Collections Account shall be used to reduce the Government of the Republic of Korea indebtedness to the Bank of Korea as directed by the Combined

Economic Board from time to time and for such other purposes as may be agreed upon.

(d) The Government of the United States of America will from time to time notify the Government of the Republic of Korea of its requirements for expenditures in hwan related to operations under these Agreements, and the Government of the Republic of Korea will thereupon make such sums available out of any balances in the Special Account in the manner requested by the Government of the United States of America in the notification. The amount so drawn for these purposes shall not exceed five percent of the culmulative deposits to the Special Account at the time of any such request, except as the Combined Economic Board may approve.

(e) Except as provided in paragraph (d) above, withdrawals from the Special Account shall be accomplished only with the authority of the Combined Economic Board and the funds withdrawn shall be used only for such purposes and in such manner as approved by the Combined Economic Board.

[86] OFFICE OF THE UNC ECONOMIC COORDINATOR FOR KOREA

APO 301

14 December 1953

Dear Mr. Prime Minister:

Further to our discussions as to terms of the Combined Economic Board Agreement, we both realize the absolute necessity of preventing further inflation and of having control over the expansion of credit. As stated in the Agreement the decision to limit credit expansion is a decision of the Republic of Korea and I fully agree that no foreign representative should have authority to exercise such control.

Sincerely yours, S/ C. Tyler Wood, UNC Economic Coordinator

The Honorable Paik Too Chin, Prime Minister, Republic of Korea.

[87] OFFICE OF THE UNC ECONOMIC COORDINATOR FOR KOREA

APO 301

14 December 1953

Dear Mr. Prime Minister:

I am writing to confirm our understanding with regard to the last sentence of the first paragraph of our agreement.

Final decisions on the amount of Korean funds to be used in support of the common undertaking will be made by the Government of the Republic of Korea. There is no hint of any authority on the part of the United States Government to interfere in the making of these decisions.

In the unlikely event that the Republic of Korea were to make a totally inadequate contribution of its own resources to our common undertaking, while this would be a matter for decision by the Republic of Korea, the U.S. Representative, under those circumstances would have to consider whether the use of American resources available for the common undertaking could continue to be justified.

Sincerely yours, S/ C. Tyler Wood, UNC Economic Coordinator

The Honorable Paik Too Chin, Prime Minister, Republic of Korea.

[88-89] OFFICE OF THE PRIME MINISTER

Republic of Korea

Seoul, Korea
14 December 1953

Dear Mr. Wood:

I have the honor to refer to your letter of 14 December 1953 which states *inter alia*:

> "It is the understanding of the Government of the United States of America that the military conversion rate will be set 180 to 1 until June 1, 1954, at which time it will be examined in the light of the February 25, 1953 Agreement to determine, after consultation together, whether under that Agreement it should be changed.
>
> "It is not expected that any public announcement shall be made concerning this subject.
>
> "If the above is acceptable to you, I would appreciate it if you would confirm your agreement in an official letter."

I wish to confirm that the above is also the understanding of the Government of the Republic of Korea.

Sincerely yours, S/ Too Chin Paik, Prime Minister, Republic of Korea.

Mr. C. Tyler Wood, UNC Economic Coordinator, Seoul, Korea.

[90] EXHIBIT 7

CARDINAL PRINCIPLES OF PROCUREMENT PROCEDURES FOR FOA FINANCED AID GOODS

December 29, 1953

[91] CARDINAL PRINCIPLES OF PROCUREMENT PROCEDURE FOR FOA FINANCED AID GOODS

1. In the use of FOA funds for the procurement of needed materials and equipments, the ROK Government will take full responsibility for procurement and speedy delivery.

2. In principle, the Government of ROK and Korean business-men will take full responsibility for procurement. In case of unusually highly specialized items which are better handled by US agencies, the ROK Government will request US Agencies to procure.

3. In order to make the procurement procedures more effective, suppliers' bids will be received and contracts awarded in Seoul, Korea.

4. The following advantage (as the ROK Government Foreign Exchange dollar load schemes have shown) will be obtained:

a. The delivery of commodities for civilian use will be speeded up because of procurement by civilian importers.

b. The hwan collections will be known, for the amounts are specified in SA's (sub-authorizations) before actual delivery.

c. Upon arrival of the goods, their circulation will be freer because of the distribution by civilians.

5. As far as possible civilian importers in Korea will be utilized even in the procurement of goods for Government use.

6. The market courses for procurements should be world-[92] wide if possible so as to make bidding fully competitive. ROK procurement officials abroad will be fully mobilized.

7. In order to make for smooth management and for a free flow of imported aid goods, exact divisions as to the administrative responsibilities regarding procurement planning, actual procurement and disposals after importation, are necessary.

8. In order to simplify methods, the procurement procedures for aid goods will be exempted from the general commercial procurement regulations of the MCI: the SA will be regarded as an import license.

9. It is agreeable to have a procurement advisor to the Government of the Republic of Korea.

10. Goods imported into Korea under FOA financing are not to be exported except upon special agreement between FOA and the ROK Government.

Article I. Preparation of Firm Request: In principle, "government use" goods as defined in Article III below and certain salable commodities as may be agreed in FRs will be procured by the ROK Government and "civilian use" goods as defined in Article III below will be procured by private individuals. Nevertheless, if a prior indication is given on the Firm Request for a specific type of procurement procedure measure to be applied (e.g. through U.S. Government agencies) exception will be made.

Article II. Firm Requests will be classified according to the four following categories:

[93] a. Procurement by US Government agency (or its designated body) when considered more advantageous than ROK procurement; e.g. where the types of goods necessitate highly specialized procurement methods—such as a dredge.

b. Procurement by ROK Office of Procurement for governmental use goods (e.g. communication equipment, rail-locomotives, etc.)

c. Procurement by private importers on a competitive basis. By this, the importers are permitted a free sale of imported goods as the goods are for civilian use and are freely marketable (e.g. raw rubber, cotton yarn)

d. Procurement by private end-users (who have before arrival of the goods already been specified to be the end-users) (e.g. automobile tire plant equipment)

Article III. ROK Office of Planning will, to the maximum feasible extent, prepare the Firm Request to import the aid goods, in consultation with the foreign aid agencies in Korea for submission to CINCREP, and will announce to the public for information.

According to the following uses for aid goods, the preparation of the Firm Request will be classified into two categories.

a. Goods for government use, paid from the ROK Government hwan budget ("government use" goods)

[94] b. Goods for ROK private individuals, paid by Korean individuals ("civilian use" goods)

Article IV. Forwarding of the Firm Request: After approval, CINCREP will forward the Firm Requests submitted by the ROK Office of Planning to FOA Washington.

Article V. Issue of Procurement Authorization: FOA Washington will issue the Procurement Authorizations according to Firm Requests, and will send 10 copies to CINCREP.

CINCREP will send several copies of the procurement authorization to ROK Office of Planning.

Article VI. Procurement Procedures: Procurement shall be conducted according to the following procedures:

1. Procurement to be made by the Office of Procurement:

a. ROK Office of Planning will send the PA to the ROK Office of Procurement with the FRs and specifications.

b. The ROK Office of Procurement will make public a procurement notice, according to the FR and PA sent by the ROK Office of Planning, will fix a date and time for public opening of bids and will further send copies of procurement notices to ROK Procurement officers abroad (or to ROK diplomatic or consular officials where no ROK Procurement officers have been appointed), for forwarding back quotations received abroad.

c. The ROK Office of Procurement will duly sign a contract with the successful tenderers after proper review at the expiration of the time limit stated in the procurement notice. The contract will be effective upon issuance by FOA [95] Washington of a Letter of Commitment.

d. In the procurement notice, explicit conditions will be laid down according to FOA regulations: e.g. any C'F cost exceeding U.S. export price and any commission included in the invoice dollar price paid to a non-resident of the U.S. will be requested by FOA for refund according to the FOA regulations.

e. In the procurement contract, a minimum amount in hwan or dollars must be deposited as a guarantee, as fixed by Office of Procurement in the procurement notice.

f. The ROK Office of Procurement will issue promptly a

Sub-authorization after the contract has been signed, and will notify the Bank of Korea. Furthermore, copies of the sub-authorization and abstract of contract will be sent to ROK Office of Planning, CINCREP, ROK Ministry concerned and ROK Office of Supply.

g. ROK Office of Planning and CINCREP will review the Sub-authorization and will request FOA Washington for the issue of a Letter of Commitment. The ROK Office of Planning will notify ROK Office of Procurement and Bank of Korea the fact that the request has been sent.

h. The Bank of Korea will send instructions for opening a letter of credit under FOA rgulations to the US correspondent bank when informed of the above request. The contractor will pay in hwan the regular ROK charges for open letter of credit. Upon receipt of above instruction, US correspondent bank will open an irrevocable letter of [96] credit to the supplier based upon the Letter of Commitment issued by FOA Washington. The above irrevocable letter of credit will be settled in due account when all conditions of the letter of credit have been carried out.

i. When goods arrive at the ROK Office of Supply, the end-users will pay for the goods according to the description of Firm Requests, and will be given delivery.

j. The ROK Office of Supply, upon notification by the ROK Office of Procurement will pay the hwan mark-up to the importer according to the provisions of the contract signed from its revolving fund, and will recover the amount together with the hwan equivalent of the dollar landed cost, from the ROK agency or end-user to which delivery of the goods is made by the Office of Supply.

2. Procurement for Civilian use—other than goods purchased by ROK gov't and specified goods for private end-users as prescribed in Article II d. above.

a. The Office of Planning will send to the ROK the FRs and PAs issued by FOA Headquarters.

b. After receiving the PA the ROK will within the fixed time limit send notification to the general public inviting tenders and will award sub-authorizations to the highest bidders, but in no case at less than hwan 190 to one dollar.

c. In order to avoid monopolistic practices the ROK will limit the awards of SAs to each person to one-fourth of the

total amount of the PA. However, this rule will not be applied when there are no competitive bidders.

d. As soon as the Bank of Korea notifies the [97] Office of Planning the result of bidding, the latter will request CINCREP to ask for the issue of a Letter of Commitment by FOA Hq. ROK will issue sub-authorization to the importers after receiving notification from the Office of Planning that the request for Letter of Commitment to FOA Hq. has been dispatched.

e. The importers, before receiving SAs must deposit to the Bank of Korea not less than 25% in hwan of the total SA amount at the conversion rate the bidder applied at the time of bidding. Upon receipt of documents in Korea showing payment of FOA dollars, the remaining amount will be paid in cash or by bank credit according to the directive of the Bank of Korea. When the importers request the opening of Letters of Credit for their suppliers, the Bank of Korea will request the corresponding United States bank to issue the letters of credit. The corresponding United States bank will issue for the suppliers the irrevocable Letters of Credit on the basis of Letter of Commitment issued by FOA headquarters. The importer will pay in hwan the regular ROK charges for opening Letter of Credit.

f. After arrival in Korea of the goods, the importer will receive them and dispose of them freely after the fulfillment of the conditions of the Letter of Credit and the SA.

g. The hwan currency deposited at the Bank of Korea will be transferred to the Aid Goods Collection Account at the Bank of Korea.

[98] 3. Procurement of Specified Goods for end-users (see Article II d. above)

a. The Office of Planning will send to the Bank of Korea the FRs and PAs received from FOA headquarters.

b. After receiving FRs and PAs from Office of Planning, the Bank of Korea will prepare SAs. The Office of Planning will request CINCREP to ask FOA headquarters to issue Letter of Commitment. After receiving the notification from the Office of Planning that request for a Letter of Commitment has been dispatched, the Bank of Korea will issue SAs to the end-users.

c. The end-users, before receiving SAs, must deposit in the Bank of Korea not less than 15% in Hwan of the total

SA amount at the conversion rate fixed in the FR. When end-users request the opening of Letter of Credit for their suppliers, the Bank of Korea will request the corresponding United States Bank to issue a Letter of Credit. The corresponding United States Bank will issue for the suppliers an irrevocable Letter of Credit on the basis of the Letter of Commitment issued by FOA headquarters. The end-user will pay in Hwan to the ROK the regular charges for opening Letter of Credit.

d. After arrival in Korea of the goods and fulfillment of the conditions in Letter of Credit, the end-users will pay to the Bank of Korea the remaining amount and receive the imported goods, and the Bank of [99-100] Korea will shift to the AID Goods Collection Account the full 100% Hwan equivalent of the dollar-landed cost.

4. Procurements to be made by U. S. Procurement Agencies: See Article II a. above. (N.B.: Only to be employed if CEB approves)

a. FOA Washington will arrange the procurement through U. S. Procurement Agencies and will keep ROK Office of Planning informed through CINCREP of the action taken.

b. ROK Office of Planning will inform, in turn, the respective ROK Ministry and the ROK Office of Supply.

[101] EXHIBIT 8

ORIGINAL

A.I.D. Grant FE-66-14

489-K-60

PROGRAM ASSISTANCE GRANT AGREEMENT

(FY 1966, #1)

BETWEEN THE REPUBLIC OF KOREA AND THE UNITED STATES OF AMERICA

Dated: November 29, 1965

656-64-498-56-59-61

64 illegible !!!

[102] PROGRAM ASSISTANCE GRANT AGREEMENT

AGREEMENT, dated the 29th day of November 1965, between the GOVERNMENT OF THE REPUBLIC OF KOREA ("Grantee") and the UNITED STATES OF AMERICA, acting through the Agency for International Development ("A.I.D.").

1. *The Grant*

SECTION 1.1 *The Grant.* In accordance with the agreement of Economic Assistance and Technical Cooperation between the Government of the Republic of Korea and the United States, entered into February 8, 1961, and subject to the terms and conditions of this Agreement, A.I.D. hereby agrees to grant the Grantee pursuant to the Foreign Assistance Act of 1961, as amended, up to Fourteen Million and Six Hundred Thousand United States Dollars ($14,600,000) for the foreign exchange costs of essential commodities and commodity related services to promote the economic and political stability of Korea. Commodities and services authorized to be financed hereunder are hereinafter referred to as "Eligible Items."

2. *Conditions Precedent*

SECTION 2.1. *Conditions Precedent to Issuance of Initial Letter of Commitment or Other Disbursing Authorization.* Except as A.I.D. may otherwise agree in writing, prior to the issuance of the first letter of commitment or other disbursing authorization, Grantee shall furnish in form and substance satisfactory to A.I.D.:

[103] (a) An opinion satisfactory to A.I.D. of the Minister of Justice of the Grantee or of other counsel satisfactory to A.I.D. that this Agreement has been duly authorized or ratified by, and executed on behalf of Grantee and constitutes a valid and legally binding obligation of Grantee in accordance with its terms; and

(b) The name of the person or persons who will act as the representative or representatives of Grantee pursuant to Section 7.2 together with evidence of his or their authority and a specimen signature of each person certified as to its authenticity.

(c) Assurance of the continuation of satisfactory stabiliza-

tion performance under the CY 1965 stabilization program;

(d) Agreement on the amounts to be allocated and the procedures for allocating restricted (quota) imports;

(e) Assurance that a 750,000 MT lime program will be implemented by the ROKG during the course of CY 1966 in order to assure the efficient application and utilization of phosphate, mixed, and potash fertilizers included in the SA import program.

SECTION 2.2 *Terminal Date for Fulfillment of Conditions Precedent.* Except as A.I.D. may otherwise agree by specifying in an implementation letter, if the conditions required by Section 2.1 have not been satisfied by December 31, 1965, A.I.D. at any time thereafter but prior to the satisfaction of the applicable condition may at its option terminate this Agreement by written notice to Grantee.

[104] 3. *General Covenants*

SECTION 3.1 *Non-Taxation of Agreement.* This Agreement and the amount to be granted hereunder shall be free from any taxation or fees imposed under any laws in effect within the Republic of Korea.

SECTION 3.2 *Commissions, Fees, and Other Payments.* Grantee warrants and covenants that in connection with obtaining the assistance to be furnished hereunder or any action under this Agreement it has not paid and will not pay or agree to pay nor to the best of its knowledge has there been paid or will there be paid or agreed to be paid by any other person or entity, commissions, fees, or other payments of any kind, except as regular compensation to Grantee's full-time officers and employees or as compensation for bona fide professional, technical, or other comparable services. Grantee shall promptly report to A.I.D. any payment or agreement to pay for such bona fide professional, technical, or comparable services to which it is a party or of which it has knowledge and if the amount of any such payment is deemed unreasonable by A.I.D., Grantee shall cause a reduction satisfactory to A.I.D. to be made therein.

4. *Procurement, Utilization, and Eligibility of Commodities*

SECTION 4.1 *A.I.D. Regulation 1.* Except as A.I.D. may otherwise specify in writing, this grant, and the procurement and utilization of Eligible Items financed under it, is

subject to the terms and conditions of A.I.D. Regulation 1 as from time to time amended and in effect, which is incorporated and made a part hereof. If any provision of A.I.D. [105] Regulation 1 is inconsistent with a provision of this Agreement, the provision of this Agreement shall govern.

SECTION 4.2 *Source of Procurement.* Except as A.I.D. may otherwise agree in writing, all Eligible Items shall have their source in the countries or areas included in the A.I.D. Geographic Code indicated in the Commodity Procurement Instructions issued under this Agreement.

SECTION 4.3 *Date of Procurement.* No commodities or commodity related services may be financed hereunder which were ordered or contracted for by the importer or his agent prior to the Eligibility Date, which shall be the date of this agreement.

SECTION 4.4 *Eligible Items.* Commodities in the categories listed in Attachment A (attached hereto and made a part hereof) may be financed under this grant, subject to the restrictions indicated therein, elsewhere in this Agreement, and in any Implementation Letter and/or Commodity Procurement Instruction issued hereunder. A.I.D. may decline to finance any specific commodity or service when, in its judgment, such financing would be inconsistent with the purposes of this grant or of the Foreign Assistance Act of 1961, as amended.

SECTION 4.5 *Utilization of Commodities.* Grantee shall use its best efforts,

(a) to assure the prompt and effective utilization of the commodities financed under this agreement in accordance with the applicable Korean and A.I.D. legislation, policies, and regulations; and,

(b) to prevent the use of commodities financed under this Agreement to promote or assist any project or activity associated with or financed [106] by any country not included in Code 935 of the A.I.D. Geographic Code Book as in effect at the time of such projected use, except with the prior written consent of A.I.D.

SECTION 4.6 *Minimum Size of Transactions.* Except where authorized by A.I.D. in writing, no foreign exchange allocation or letter of credit issued pursuant to this Agreement shall be in an amount less than One Thousand Dollars ($1,000).

SECTION 4.7 *Procedures.* A.I.D. will issue a Commodity Procurement Instruction (CPI) for the information and reference of both parties which will record:

—a description of the procurement authorized by this Agreement;

—the applicable Commodity Financing Procedures which, pursuant to this Agreement, are A.I.D.'s Standard Commodity Financing Procedures utilizing A.I.D. Regulation 1 except as Regulation 1 may be inconsistent with the Agreement;

—the authorized methods of financing, as set out in Section 5 hereof;

—special provisions applicable to the procurement authorized by this Agreement (including both provisions applicable to specific commodity codes and provisions of general application). Such special provisions will be stated in form suitable for incorporation in instructions to importers issued by Grantee.

5. *Disbursement*

SECTION 5.1 *Requests for Letters of Commitment.* To obtain disbursements, Grantee may from time to time submit Financing Request to A.I.D. [107] for the issuance of letters of commitment to one or more banks in the United States designated by Grantee and satisfactory to A.I.D., committing A.I.D. to reimburse such bank or banks for payments made, through letters of credit or otherwise, to Grantee or any designee of Grantee, pursuant to such documentation requirements as A.I.D. may prescribe. Banking charges incurred pursuant to this section in connection with letters of commitment and disbursements shall be for the account of Grantee and may not be financed hereunder.

SECTION 5.2 *Other Forms of Disbursement.* Disbursement may also be made through such other means as Grantee and A.I.D. may agree to in writing.

SECTION 5.3 *Terminal Date for Requests for Letters of Commitment and for Disbursements.* Except as A.I.D. may otherwise agree by specifying in an Implementation Letter, no letters of commitment shall be issued in response to Financing Requests received after March 31, 1966, and no disbursement shall be made against documentation received by the Bank after December 31, 1966.

SECTION 5.4 *Documentation Requirement.* Regulation 1 specifies in detail the documents required by A.I.D. to substantiate disbursements under this grant Agreement whether by letter of commitment or other method of financing. The document number shown on the letter of commitment or other disbursing authorization document shall be the number reflected on all disbursement documents submitted to A.I.D. In addition to the above, the Grantee shall maintain records adequate to establish that the commodities financed hereunder have been utilized in accordance with Section 4.5 [108] of this agreement and that the appropriate hwan deposits have been made in the Special Account in accordance with Section 5.5 of this Agreement.

SECTION 5.5 *Deposit of Counterpart.* The Grantee will make such arrangements as may be necessary to assure that won equivalent to proceeds accruing to the Grantee or any agency thereof as a result of the sale on importation of "Eligible Items" will be deposited in the Special Account referred to in para 4 of the aforesaid Agreement of Economic and Technical Cooperation for use in accordance with the terms and conditions of that Agreement.

6. *Remedies of A.I.D.*

SECTION 6.1 *Termination of Disbursements.* In the event that at any time:

(a) Grantee shall fail to comply with any provision contained herein; or

(b) Any representation or warranty made by or on behalf of Grantee with respect to obtaining this Grant or made or required to be made hereunder is incorrect in any material respect; or

(c) An event has occurred which A.I.D. determines to be an extraordinary situation which makes it improbable that the purposes of the Grant will be attained or that Grantee will be able to perform its obligations hereunder; or

(d) Any disbursement would be in violation of the legislation governing A.I.D.; or

(e) A default shall have occurred under any other agreement between [109] Grantee or any of its agencies and the United States or any of its agencies; then A.I.D., in addition to remedies provided in A.I.D. Regulation 1, at its option, may (i) decline to issue further letters of commitment

or other disbursing authorizations, (ii) suspend or cancel outstanding letters of commitment or other disbursing authorizations to the extent that they have not been utilized through the issuance of irrevocable letters of credit, or to the extent that A.I.D. has not made direct reimbursement to the Grantee thereunder, giving notice to Grantee promptly thereafter, (iii) decline to make disbursements other than under letters of commitment; and (iv) at A.I.D.'s expense, direct that title to goods financed hereunder shall be transferred to A.I.D., if the goods are in deliverable state and have not been offloaded in ports of entry of Korea.

SECTION 6.2 *Refunds.* In addition to any refund otherwise required by A.I.D. pursuant to Regulation 1, if A.I.D. determines that any disbursement is not supported by valid documentation in accordance with this agreement, or is in violation of the law governing A.I.D., or that the commodities financed under this Agreement are not financed or used for the purpose of and in accordance with the terms of this Agreement, the Grantee shall pay to A.I.D. within ninety (90) days after receipt of request, an amount not to exceed the amount of such disbursement. Refunds paid by the Grantee to A.I.D. resulting from violations of the terms of this Agreement shall be considered as a reduction in the amount of A.I.D.'s obligation under the Agreement and shall not be available for re-use under the Agreement.

[110] SECTION 6.3 *Waivers of Default.* No delay in exercising or omitting to exercising, any right, power, or remedy accruing to A.I.D. under this Agreement shall be construed as a waiver of any of these rights, powers, or remedies.

SECTION 6.4 *Expenses of Collection.* All reasonable costs incurred by A.I.D. (other than salaries of its staff) in connection with the collection of amounts due under this Agreement may be charged to Grantee and reimbursed as A.I.D. may specify.

7. *Miscellaneous*

SECTION 7.1 *Reports.* The Grantee shall furnish A.I.D. with such information and reports, relating to undertakings in and procurement financed under this Grant, as A.I.D. may reasonably request.

SECTION 7.2 *Use of Representatives.*

(a) All actions required or permitted to be performed or taken under this Agreement by Grantee or A.I.D. may be performed by their respective duly authorized representatives.

(b) The Grantee hereby designates the Minister, Economic Planning Board, as its representative with authority to designate in writing other representatives of Grantee in its dealings with A.I.D. Grantee's representatives designated pursuant to the preceding sentence, unless A.I.D. is given notice otherwise, shall have authority to agree on behalf of Grantee to any modification of this Agreement which does not substantially increase Grantee's obligations hereunder. Until receipt by A.I.D. of written notice of revocation by Grantee of the authority of any of its representatives, [111] A.I.D. may accept the signature of such representatives on any instrument as conclusive evidence that any action effected by such instrument is authorized by Grantee.

SECTION 7.3 *Communications.* Any notice, request, or other communication or any document given, made, or sent by Grantee or A.I.D. pursuant to this Agreement shall be in writing and shall be deemed to have been duly given, made, or sent to the party to which it is addressed when it shall be delivered by hand or by mail, telegram, cable, or radiogram to such party at the following address:

To Grantee:

Mail Address: Minister of Economic Planning Board
Government of the Republic of Korea
Seoul, Korea

Cable Address: EPB, ROK Seoul, Korea

To A.I.D. (Two copies):

Mail Address: United States Operations Mission to Korea
c/o American Embassy, Seoul, Korea

Cable Address: USOM
c/o American Embassy, Seoul, Korea

All communications or documents submitted to A.I.D. hereunder shall be in English and all technical and en-

gineering specifications therein shall be in terms of U.S. standards, except as A.I.D. may otherwise agree in writing.

[112] Government of Republic of Korea.
By: K. Y. Cheng, Title: Minister of Economic Planning Board.

United States of America.
By: Joel Bernstein, Title: Director, USOM/Korea

ELIGIBLE COMMODITIES

Procurement of eligible commodities in the following categories, and of services related to such commodities, may be financed to the extent of any limiting amounts shown herein, subject to the restrictions and provisions indicated in this Agreement and/or pertinent implementing documents. Commodities in such other categories in such amounts as A.I.D. may agree to in writing may be substituted for the commodities shown herein, within the total amount authorized.

The amounts shown against certain commodity categories may be exceeded to the extent of 20 per cent without prior A.I.D. approval provided that the total value of these limited commodities does not exceed $8,600,000. Deviations in excess of 20 per cent, or the procurement of any commodities not within the categories listed below, require the prior written authorization of A.I.D.

[113]

A.I.D. Code No.		Amount ($000)
0502	Tallow, other animal fats and oils	No limit
2341	Chemical and Mechanical Fertilizer Mixtures	6,400
3908	Chemical and Chemical Preparation Synthetic Plastic Materials	No limit
5408	Acetate Rayon Yarn	No limit
5912	Pulp	No limit
6409	Non-Metallic Mineral	No limit
8912	Synthetic Rubber	No limit
370	Medicinals and Pharmaceutical Preparations	No limit
950	Ocean Transportation (Only for Fertilizer)	2,200
		14,600

Note: Ineligible commodities within the above categories are listed in A.I.D. Manual Order 1454.3, as from time to time amended.

[114] DEPARTMENT OF STATE
AGENCY FOR INTERNATIONAL DEVELOPMENT
WASHINGTON, D.C. 20523

November 30, 1965

Economic Planning Board
Republic of Korea Government
Seoul, Korea

Subject: A.I.D. Grant FE 66-14, Implementation Letter No. 1

Dear Sirs:

This letter sets forth the procedures for using the proceeds of the captioned Grant Agreement for the foreign exchange costs of commodities and commodity-related services and provides information to assist you in implementing the procurement in accordance with our Grant Agreement. Nothing in this letter or its attachments alters the scope of the Grant Agreement or the terms of the specific sections that are referred to or explained.

Instructions and explanations in this Implementation Letter and the attachments may be supplemented or modified by subsequent Implementation Letters as necessary from time to time.

I. *General Conditions Precedent to Financing*

A.I.D. will issue a first and any additional requested Letters of Commitment or authorize disbursements by other means to finance operations under the Agreement after the conditions prescribed in the Agreement and listed below have been met.

A. *Legal Opinion* (Sec. 2.1(a)). This opinion should first be reviewed in draft with the Legal Counsel of the United States Operations Mission (USOM), Seoul, and then formally submitted to USOM for approval. Attachment A will serve as a guide in preparing this opinion.

B. *Representatives* (Sec. 2.1(b)). You should submit specimen signatures of the person or persons authorized to act for the Government of the Republic of Korea (ROKG) as provided in Section 7.2(b) of the Grant Agreement. If the person named to act as your representative is the same person who has executed the Grant Agreement, no certification will be required, although the Legal Opinion called

for under Section 2.1(a) will, of course, treat of his purported authority in executing the Grant Agreement.

C. *Statement on Commissions* (Sec. 3.2). The language of Section 3.2 is self-explanatory. If no commission has been paid or agreed to be paid, a statement to this effect should be submitted to A.I.D.

[115] D. *Other Conditions Precedent Prior to Authorizing Disbursements Under the Grant Agreement.* In accordance with conversations had with your representatives in Seoul during September and October 1965, it is the mutual understanding of the Grantee and A.I.D. that the purpose of the Grant is to assist Korea's economic development program through the financing of essential imported goods and services. This financing, in turn, will aid in achieving the investment levels envisaged in the five-year development program of Korea. In order to generate sufficient resources to finance the investment called for by the Grantee's economic and social development program, however, it is anticipated that it will be necessary for Korea to achieve a reasonable degree of monetary stabilization and to utilize the resources made available under this Grant in an efficient manner. Accordingly, the A.I.D. funds will be made available when:

1. (Sec. 2.1(c)) The ROKG provides written assurance of its intent to continue to take the necessary actions required for the continuation of satisfactory performance under the CY 1965 Stabilization Program.

2. (Sec. 2.1(d)) The USOM and the ROKG agree on the amounts to be allocated and the procedures for allocating restricted (quota) imports. This agreement is to be recorded in an exchange of letters.

3. (Sec. 2.1(e)) The EPB will provide written assurance to the USOM/Korea that the ROKG will distribute 750,000 MTs of lime during CY 1966 to assure that the fertilizer imported under this Grant Agreement will be efficiently utilized.

E. When all conditions precedent to disbursement under this Agreement have been satisfied, the Director, USOM, shall so notify the EPB in writing.

II. *Commodity Procurement Instruction*

A.I.D. agrees that the commodity categories listed in the Commodity Procurement Instruction (CPI) attached to this Letter are eligible for financing under the Agreement, subject to the restrictions indicated in the CPI.

The rules and procedures governing transactions to be financed under the Agreement are discussed in the CPI.

III. *Financing Arrangements*

Requests for Letters of Commitment under the Agreement should be submitted to the US Operations Mission in Korea on the A.I.D. Financing Request form. The full identification number shown on a Letter of Commitment issued by A.I.D. in response to a Financing Request must be [116] shown on all subsequent correspondence in connection therewith and on all documents including the Supplier's Certificate submitted for payment to U.S. Banking Institutions.

IV. *Records*

The records required to be maintained by the Government of the Republic of Korea under Section 5.4 of the Agreement concerning the arrival and utilization of the Eligible Items financed by A.I.D. under the Agreement shall be adequate to satisfy the requirements of Section 201.41 of A.I.D. Regulation I as incorporated in the Agreement under Section 4.1. Such records shall identify the commodities received under the Agreement with the specific payments made or received by A.I.D. as reflected in monthly detail transaction reports prepared by A.I.D. and forwarded to the Government of the Republic of Korea, and shall be maintained in the general manner specified in A.I.D. Manual Order 754.6 to accomplish the purposes indicated therein. Assistance in establishing the records necessary to accomplish the foregoing may be obtained from the Controller, USOM/Korea.

The records required to be maintained by your Government under Section 5.4 of the Agreement concerning the accounting for and deposit of counterpart as indicated in Section 5.5 of the Agreement shall continue as maintained under existing arrangements and/or agreements in effect

on the date of the Agreement and as may be amended from to time.

V. *Reporting*

In accordance with Section 7.1 of the Agreement, reporting shall continue as established under existing arrangements and/or agreements in effect on the date of the Agreement and as otherwise may be requested by the USOM/Korea from time to time.

You are requested to furnish in the English language all required documentation.

A.I.D. will be glad to discuss with your representatives any problem or questions you may have concerning the implementation of the Agreement, or relative to this Letter or attachments to it.

Sincerely yours, Joel Bernstein, Director, U.S. Operations Mission to Korea.

Attachments:

A. Guide for Assistance of Counsel in Preparing Legal Opinions.

[117]

DEPARTMENT OF STATE
AGENCY FOR INTERNATIONAL DEVELOPMENT
WASHINGTON, D.C. 20523

GUIDE FOR THE ASSISTANCE OF COUNSEL IN PREPARING OPINIONS CONCERNING VALIDITY OF OBLIGATIONS OF GOVERNMENTS PURSUANT TO PROVISIONS IN AGENCY FOR INTERNATIONAL DEVELOPMENT (A.I.D.) LOAN AGREEMENTS.

GENERAL PRINCIPLES:

(a) A.I.D. prefers the opinion of the senior legal officer of the Government concerned.
(b) The opinion should reach in substance the conclusions stated in the Loan Agreement provision on legal opinions.
(c) A.I.D. will look for an explanation of the legal basis on which such conclusions were reached.
(d) A.I.D. will expect counsel to include relevant excerpts in English from the Constitution, statutes, executive orders or decrees, public notices, etc., relied upon in such opinion.
(e) Two copies of the opinion should be submitted to A.I.D. and should be in English.

The legal opinion should support its conclusions by an explanation of how the conclusions arrived at were reached. This would include: citation of the basic legal authority for entering into the Agreement, indication how the Government representative signing was authorized to do so, and an affirmative representation that there are no other requirements of law to make the Loan Agreement or the actions taken pursuant to it valid and binding.

[118] PROGRAM ASSISTANCE GRANT AGREEMENT
(Amendment No. 1)

This AMENDATORY AGREEMENT ("Amendment No. 1") dated the 10 day of March, 1966, between the GOVERNMENT OF THE REPUBLIC OF KOREA ("Grantee") and the UNITED STATES OF AMERICA, acting through the Agency for International Development ("A.I.D.");

WITNESSETH THAT:

WHEREAS, the parties hereto have heretofore, on the 29th day of November 1965, entered into a Program Assistance Grant Agreement ("Agreement" pursuant to which A.I.D. agreed subject to certain terms and conditions stated therein, to grant to Grantee up to Fourteen Million and Six Hundred Thousand United States Dollars ($14,600,000) for the foreign exchange costs of essential commodities and commodity related services to promote the economic and political stability of Korea; and

WHEREAS, Grantee has proposed and A.I.D. has concurred in a program of measures to be taken and goals to be achieved in calendar year 1966 in furtherance of the stabilization of the Korean economy as set forth more fully in the Stabilization Agreement embodied in the exchange of letters dated February 5, 1966 between the Deputy Prime Minister and Minister, Economic Planning Board of Grantee and the Director of the United States Operations Mission of A.I.D.; and

WHEREAS, in consideration of said Stabilization Agreement, A.I.D. now desires to increase said grant to Grantee for the aforesaid purposes by an additional sum of up to Twenty-Four Million and Four Hundred Thousand United States Dollars ($24,400,000) subject to the terms and conditions of this Amendment No. 1; and

[119] WHEREAS, the terms and conditions of this Amendment No. 1 are acceptable to Grantee:

NOW, THEREFORE, the parties hereto agree that insofar as it relates to the additional sum to be granted under this Amendment No. 1, said Agreement is hereby amended to read as follows:

1. By inserting after the first sentence of SECTION 1.1 the following:

"In addition, and for the same purposes [illegible]D. by Amendment No. 1 to this Agreement agrees to make a second grant to Grantee of up to Twenty-Four Million and Four Hundred Thousand United States Dollars ($24,400,000)."

2. By inserting after SECTION 2.1 the following:

"SECTION 2.1A *Conditions Precedent to Issuance of Initial Letter of Commitment or Other Disbursing Authorization with Respect to the Second Grant.* Except as A.I.D. may otherwise agree by specifying in an implementation letter, prior to the issuance of the first letter of commitment or other disbursing authorization with respect to the second grant, Grantee shall furnish in form and substance satisfactory to A.I.D. assurance of the initiation and continuation by the Grantee of satisfactory performance through the first quarter of CY 1966 under the Stabilization Agreement as set forth in the exchange of letters dated [120] February 5, 1966 between the Deputy Prime Minister and Minister, Economic Planning Board of Grantee and the Director of the United States Operations Mission of A.I.D."

3. By inserting after SECTION 2.2 the following:

"Section 2.2A. *Terminal Dates for Fulfillment of Conditions Precedent as to the Second Grant.* Except as A.I.D. may otherwise agree by specifying in an implementation letter, if the conditions required by Section 2.1 A have not been satisfied by April 30, 1966, A.I.D. at any time thereafter but prior to the satisfaction of the applicable condition may at its option terminate Amendment No. 1 to this Agreement by written notice to the Grantee."

4. By inserting after SECTION 4.3 the following:

"SECTION 4.3A. *Date of Procurement (Second Grant).* No commodities or commodity related services may be financed with the proceeds of the second grant hereunder which were ordered or contracted for by the importer or his agent prior to the date of Amendment No. 1 to this Agreement."

5. By adding at the end of SECTION 4.7 the following:

"A.I.D. will issue a separate CPI identified with and applicable only to the second grant."

6. By inserting after SECTION 5.3 the following:

"SECTION 5.3A. *Terminal Date for Requests for Letters of Commitment and for Disbursements (Second Grant).* [121] Except as A.I.D. may otherwise agree by specifying in an implementation letter, no letters of commitment shall be issued in response to Financing Requests received after April 30, 1966, and no disbursement shall be made against documentation received by the bank after June 30, 1967.

7. By appending the attached sheet entitled ELIGIBLE COMMODITIES SECOND GRANT ONLY.

Except as herein above specifically amended, said Agreement is in all respects ratified, confirmed and continued in full force and effect.

IN WITNESS WHEREOF, this Amendment No. 1 to said Agreement has been executed by on behalf of Grantee and A.I.D. by its duly authorized representatives this 10th day of March 1966.

Government of the Republic of Korea. By K.G. Chang, Deputy Prime Minister and Minister, Economic Planning Board.

United States of America. By Joel Bernstein, Director, United States Operations Mission, Agency for International Development.

[122] ATTACHMENT A

ELIGIBLE COMMODITIES—SECOND GRANT ONLY

Procurement of eligible commodities in the following categories, and of services related to such commodities, may be financed to the extent of any limiting amounts shown herein, subject to the restrictions and provisions indicated in this Agreement and/or pertinent implementing documents. Commodities in such other categories in such amounts as A.I.D. may agree to in writing may be substituted for the commodities shown herein, within the total amount authorized.

The amounts shown against certain commodity categories may be exceeded to the extent of 20 percent without prior A.I.D. approval provided that the total value of these limited commodities does not exceed $12,400,000. Deviations in excess of 20 percent, or the procurement of any commodities not within the categories listed below, require the prior written authorization of A.I.D.

A.I.D. Code No.		Amount ($000)
0502	Tallow, other animal fats and oils	No limit
2331	Potash Fertilizer	1,800
2353	Phosphate and Phosphatic Fertilizer	8,600
3908	Chemical and Chemical Preparation Synthetic Plastic Materials	No limit
5408	Acetate Rayon Yarn	No limit
5912	Pulp	No limit
6409	Non-Metallic Mineral	No limit
8912	Synthetic Rubber	No limit
370	Medicinals and Pharmaceutical Preparations	No limit
950	Ocean Transportation (Only for Fertilizer)	2,000
		24,400

Note: Ineligible commodities within the above categories are listed in A.I.D. Manual Order 1454.3, as from time to time amended.

[123] DEPARTMENT OF STATE
AGENCY FOR INTERNATIONAL DEVELOPMENT
WASHINGTON, D. C. 20523

Economic Planning Board
Republic of Korea Government
Seoul, Korea

Subject: A.I.D. Grant FE 66-14, Amendment No. 1, Implementation Letter No. 2

Dear Sirs:

This letter sets forth the procedures for using the proceeds of the additional grant made pursuant to Amendment No. 1 to the captioned Grant Agreement for the foreign exchange costs of commodities and commodity related services and provides information to assist you in implementing procurement in accordance with our Grant Agreement as amended by Amendment No. 1. Nothing in this letter or its attachments alters the scope of the Grant Agreement, as amended, or the terms of the specific sections that are referred to or explained.

This Implementation Letter No. 2, which relates solely to the use of the additional funds made available pursuant to Amendment No. 1 to the Grant Agreement, incorporates by reference all provisions of Implementation Letter No. 1 under the Grant Agreement except as hereinafter specifically amended or omitted. Instructions and explanations in this Implementation Letter and the attachments may be supplemented or modified by subsequent Implementation Letters as necessary from time to time.

I. *Disbursements under Amendment No. 1 to the Grant Agreement.*

A. *Initial Letters of Commitment.* A.I.D. will issue one or more Letters of Commitment up to the aggregate amount of $18,400,000 [124] upon receipt of your requests for the issuance of such Letter in accordance with the Commodity Procurement Instruction (CPI) attached to this Letter.

B. *Conditions Precedent to the Issuance of other than Initial Letters of Commitment.* A.I.D. will issue addi-

tional Letters of Commitment up to the aggregate amount of $6,000,000 when the conditions precedent specified in Section 2.1A of the Grant Agreement, as amended, have been satisfied.

(The text of Article I of Implementation Letter No. 1 is deleted in its entirety)

II. *Commodity Procurement Instructions.*

A.I.D. agrees that the commodity categories listed in the attached CPI are eligible for financing under the Grant Agreement, as amended, subject to the restriction indicated in said CPI.

The rules and procedures governing transactions to be financed under the Grant Agreement, as amended, are discussed in the CPI.

III. *Financing Arrangements.*

The text of Article III of Implementation Letter No. 1 is incorporated by reference in its entirety.

IV. *Records.*

The text of Article IV of Implementation Letter No. 1 is incorporated by reference in its entirely, with the insertion of the following sentence at the end of the second sentence of the first paragraph:

"Such records shall be maintained so as to clearly segregate transactions which are applicable to (a) the grant made under [125] the original Grant Agreement and (b) the second grant made under Amendment No. 1 to said Agreement".

V. *Reporting.*

The text of Article V of Implementation Letter No. 1 is incorporated by reference in its entirety.

USOM will be glad to discuss with your representatives any problem you may have concerning the implementation of the Grant Agreement, as amended, or concerning this letter or its attachments.

Sincerely yours, Joel Bernstein, Director, U.S. Operations Mission to Korea.

Attachments:

A. Eligible Commodities (Second Grant only)
B. Commodity Procurement Instructions

[126] 1. Amendment No. 2 to Program Assistance Grant Agreement
2. List of Eligible Items (Third Grant Only)
3. Implementation Letter No. 3
4. CPI K-601, Revision D

[127] PROGRAM ASSISTANCE GRANT AGREEMENT
(Amendment No. 2)

This AMENDATORY AGREEMENT ("Amendment No. 2") dated the 31st day of May, 1966, between the GOVERNMENT OF THE REPUBLIC OF KOREA ("Grantee") and the UNITED STATES OF AMERICA, acting through the Agency for International Development ("A.I.D."):

WITNESSETH THAT:

WHEREAS, the parties hereto have heretofore, on the 29th day of November, 1965, entered into a Program Assistance Grant Agreement ("Agreement"), and on the 10th day of March, 1966, entered into Amendment No. 1 to said Agreement, pursuant to which A.I.D. agreed subject to certain terms and conditions stated in said Agreement and Amendment, to grant to Grantee up to Thirty Nine Million United States Dollars ($39,000,000) for the foreign exchange costs of essential commodities and commodity-related services to promote the economic and political stability of Korea; and

WHEREAS, Grantee has proposed and A.I.D. has concurred in a program of measures to be taken and goals to be achieved in the calendar year 1966 in furtherance of the stabilization of the Korean economy as set forth more fully in the Stabilization Agreement embodied in the exchanges of letters dated February 5, and April 7, 1966, between the Deputy Prime Minister and Minister, Economic Planning Board of Grantee and the Director of the United States Operations Mission of A.I.D.; and

WHEREAS, in consideration of said Stabilization Agreement, A.I.D. now desires to increase said grant to Grantee for the aforesaid purposes by an additional sum of up to Twenty-One Million United States Dollars ($21,000,000) subject to the terms and conditions of this Amendment No. 2; and

[128] WHEREAS, the terms and conditions of this Amendment No. 2 are acceptable to Grantee:

NOW, THEREFORE, the parties hereto agree that, insofar as it relates to the additional sum to be granted under this Amendment No. 2, said Agreement is hereby amended to read as follows:

1. By inserting after the second sentence of SECTION 1.1 the following:

"In addition, and for the same purposes, A.I.D. by Amendment No. 2 to this Agreement agrees to make a third grant to Grantee of up to Twenty One Million United States Dollars ($21,000,000)."

2. By inserting after SECTION 2.1A the following:

"SECTION 2.1B. *Issuance of Letters of Commitment or Other Disbursing Authorizations with Respect to the Third Grant; Condition Precedent:*

(a) *Initial Letter of Commitment.* Upon receipt of Grantee's request therefor, A.I.D. will issue one or more letters of commitment in an aggregate amount not to exceed Fifteen Million United States Dollars ($15,000,000).

(b) *Condition Precedent.* Except as A.I.D. may otherwise agree by specifying in an implementation letter, prior to the issuance of any letter of commitment or other disbursing authorization with respect to the third grant other than initial letters of commitment issued under paragraph (a) above, the Grantee shall furnish in form and substance satisfactory to A.I.D., assurance of the continuation by [129] the Grantee of satisfactory performance through May 31, 1966, under the Stabilization Agreement contained in the exchange of letters dated February 5, 1966, as supplemented by the exchange of letters dated April 7, 1966, between the Deputy Prime Minister and Minister, economic Planning Board of Grantee and the Director of the United States Operations Mission of A.I.D.;"

3. By inserting after SECTION 2.2A the following:

"SECTION 2.2B. *Terminal Dates for Fulfillment of Conditions Precedent as to the Third Grant.* Except as A.I.D. may otherwise agree by specifying in an implementation letter, if the condition precedent required by Section 2.1B has not been satisfied by June 22, 1966, A.I.D. at any time thereafter but prior to the satisfaction of the condition may, at its option, terminate

Amendment No. 2 to this Agreement by written notice to the Grantee."

4. By inserting after SECTION 4.3A the following:

"SECTION 4.3B. *Date of Procurement (Third Grant).* No commodities or commodity-related services may be financed with the proceeds of the third grant hereunder which were ordered or contracted for by the importer or his agent prior to the date of Amendment No. 2 to this Agreement."

5. By adding at the end of SECTION 4.7 the following:

"A.I.D. will issue separate CPI documents, as required identified with and applicable only to the third grant."

[130] 6. By inserting after SECTION 5.3A the following:

"SECTION 5.3B. *Terminal Date for Requests for Letters of Commitment and for Disbursements (Third Grant).* Except as A.I.D. may otherwise agree by specifying in an implementation letter, no letter of commitment shall be issued in response to any Financing Request received after June 30, 1966, and no disbursement shall be made against documentation received by the bank after August 31, 1967."

7. By appending the attached sheet entitled ELIGIBLE COMMODITIES—THIRD GRANT ONLY.

Except as hereinabove specifically amended, said Agreement is in all respects ratified, confirmed and continued in full force and effect.

IN WITNESS WHEREOF, this Amendment No. 2 to said Agreement has been executed on behalf of Grantee and A.I.D. by its duly authorized representatives on the date first above written.

Government of the Republic of Korea. By K. Y. Cheng, Deputy Prime Minister and Minister, Economic Planning Board.

United States of America. By Joel Bernstein, Director, United States Operations Mission Agency for International Development.

[131] ATTACHMENT A

ELIGIBLE COMMODITIES—THIRD GRANT ONLY

Procurement of eligible commodities in the following categories, and of services related to such commodities, may be financed to the extent of any limiting amounts shown herein, subject to the restrictions and provisions indicated in this Agreement and/or pertinent implementing documents.

The amounts shown against AID Code numbers 2331, 2353 and 950 (Ocean Transportation (Fertilizer Only)) may be exceeded to the extent of 20 percent without prior A.I.D. approval provided that the total value of these codes does not exceed $15,000,000.

A.I.D. Code No.		Amount ($000)
2331	Potash Fertilizers	$11,800
2353	Phosphate and Phosphatic Fertilizer	
950	Ocean Transportation for Fertilizer	$ 3,200
0502	Tallow and other animal fats and oils	$ 6,000
3908	Raw Materials for Plastics	
5408	Man-Made Fibres and Yarns	
5912	Pulp	
6409	Other Non-Metallic Minerals and Products	
8912	Synthetic and Reclaimed Rubber and Rubber Scrap	
370	Medicinal and Pharmaceutical Preparations	
950	Ocean Transportation (Other than Fertilizer)	
	Total:	$21,000

Note: Ineligible commodities within the above categories are indicated in A.I.D. Manual Order 1454.3, as from time to time amended.

[132] Economic Planning Board
Republic of Korea Government
Seoul, Korea

Subject: A.I.D. Grant FE 66-14, Amendment No. 2, Implementation Letter No. 3

Dear Sirs:

This letter sets forth the procedures for using the proceeds of the additional grant made pursuant to Amendment No. 2 to the captioned Grant Agreement for the foreign exchange costs of commodities and commodity-related services and provides information to assist you in implementing procurement in accordance with our Grant Agreement, as amended by Amendment No. 2. Nothing in this letter or its attachments alters the scope of the Grant Agreement, as amended, or the terms of the specific sections that are referred to or explained.

This Implementation Letter No. 3, which relates solely to the use of the additional funds made available pursuant to Amendment No. 2 to the Grant Agreement, incorporates by reference all provisions of Implementation Letter No. 1 under the Grant Agreement except as hereinafter specifically amended or omitted. Instructions and explanations in this Implementation Letter and the attachments may be supplemented or modified by subsequent Implementation Letters as necessary from time to time.

I. *Disbursements under Amendment No. 2 to the Grant Agreement.*

A. *Initial Letters of Commitment.* A.I.D. will issue one or more Letters of Commitment up to the aggregate amount of $15,000,000 upon receipt of your requests for the issuance of such letters in [133] accordance with Commodity Procurement Instruction K-601, A-2 Revision D, attached to this Letter. Until the condition precedent specified in Section 2.1B has been satisfied, such funds shall be available only for the procurement of fertilizer (Codes 2331 and 2353) and ocean transportation for fertilizer (Code 950).

B. *Condition Precedent to the Issuance of other than Initial Letters of Commitment.* A.I.D. will issue addi-

tional letters of commitment up to the aggregate amount of $6,000,000 when the condition precedent specified in Section 2.1B of the Grant Agreement, as amended, has been satisfied. Such funds, together with the balance of funds remaining under the initial letter of commitment, may be utilized for the procurement of any of the commodities and commodity-related services listed in CPI No. 3. (The text of Article I of Implementation Letter No. 1 is deleted in its entirety)

II. *Commodity Procurement Instructions.*

A.I.D. agrees that the commodity categories listed in the attached CPI K-601, A-2 Revision D are eligible for financing under the Grant Agreement, as amended, subject to the restrictions indicated in said CPI.

The rules and procedures governing transactions to be financed under the Grant Agreement, as amended, are discussed in the CPI.

III. *Financing Arrangements.*

The text of Article III of Implementation Letter No. 1 is incorporated by reference in its entirety.

[134] IV. *Records.*

The text of Article IV of Implementation Letter No. 1 is incorporated by reference in its entirety, with the insertion of the following sentence at the end of the second sentence of the first paragraph:

"Such records shall be maintained so as to clearly segregate transactions which are applicable to (a) the grant made under the original Grant Agreement and (b) the second grant made under Amendment No. 1 to said Agreement and (c) the third grant made under Amendment No. 2 to said Agreement."

V. *Reporting.*

The text of Article V of Implementation Letter No. 1 is incorporated by reference in its entirety.

USOM will be glad to discuss with your representatives

any problem you may have concerning the implementation of the Grant Agreement, as amended, or concerning this letter or its attachments.

Sincerely yours, Joel Bernstein, Director, U.S. Operations Mission to Korea.

Attachments:

A. Eligible Commodities (Third Grant only)
B. Commodity Procurement Instruction (CPI K-601, A-2 Revision D)

[135] DEPARTMENT OF STATE
AGENCY FOR INTERNATIONAL DEVELOPMENT
WASHINGTON, D.C. 20523

COMMODITY PROCUREMENT INSTRUCTION

AID 1130-1 (1-65)
CPI

1. To: Minister of Economic Planning Board
Government of the Republic of Korea
Seoul, Korea
2. Subject: A.I.D. Grant FE 66-14 A-2
469-K-601
3. CPI No.: K-601, A-2 Revision D.
4. Appropriation Symbol: 72-1161006.
5. Allotment Symbol: 656-64-498-56-59-61.

A.I.D. will finance the reasonable foreign exchange cost of commodities as described in the A.I.D. Commodity Code Book and of commodity related services procured to carry out the purposes of the Agreement, subject to the terms, procedures and/or special provisions contained in this CPI and any amendments thereto. Procurement authorized under the Agreement must await the receipt of Letters of Commitment or other disbursing authorizations unless specifically stated to the contrary in the special provisions attached hereto.

6. Eligible Items and Aid Commodity Codes: See attached schedule.
7. CPI Amount:
Previous $39,000,000
Increase $21,000,000
Total $60,000,000
8. Area of Source and Code: See attached schedule.
9. Eligibility Date: Dec. 29, 1965
10. Contracting Period: Ending Feb. 28, 1967
11. Shipping Period: Ending June 30, 1967
12. Terminal Disb. Date: August 31, 1967
13. Method(s) of Financing: ☒ Letter of commitment
☐ Other (specify)
14. Aid Commodity Financing Procedures:—.
15. Special provisions set forth on pages 1 through 4,

attached, are applicable, and will be incorporated by AID as appropriate in all Letters of Commitment or other disbursing authorizations issued pursuant to this CPI.

16. Approved for Aid:—

Signature: H. Hollar

17. Date: May 31, 1966

[136] Block 6 continued: *Eligible Commodities*

A. Funds authorized by each Letter of Commitment may be used only in conjunction with the commodity codes specified therein, in amounts not to exceed 20 per cent more than each of the code values shown, provided that the total for codes 2331, 2353, and 950 (Ocean Transportation for Fertilizer) does not exceed $15,000,000, and the total for all codes does not exceed the total of the Letter of Commitment.

B. The following commodities and such commodity-related services applicable thereto are eligible in the amounts specified for AID financing under the underlying authorization subject to the appropriate Special Provisions (See Block 15 below):

A.I.D. Code No.	Description	Amount ($000)
2331	Potash Fertilizers	$11,800
2353	Phosphate and Phosphatic Fertilizers	
950	Ocean Transportation for Fertilizer	$ 3,200
0502	Tallow and Other Animal Fats and Oils	$ 6,000
3908	Raw Materials for Plastics	
5408	Man-made Fibers and Yarns	
5912	Pulp	
6409	Other Non-Metallic Minerals and Products	
8912	Synthetic and Reclaimed Rubber & Rubber Scrap	
370	Medicinal and Pharmaceutical Preparations	
950	Ocean Transportation (Other than Fertilizer)	
	Total:	$21,000

Block 8 continued: *Area of Source*

US only (000) or any of the following countries if a US Source Special Letter of Credit is used as payment: Taiwan (484), Philippines (492), Tunisia (664), Morocco (608), India (386), Pakistan (391), Singapore (480), and Thailand (493).

Block 15 continued: *Special Provisions*

A. Except for the following additional special provisions, all special provisions specified in the original CPI No. 1 shall be applicable to procurement under this CPI K-601 A-2 Revision D.

[137] 1. *2331 and 2353 Potash and Phosphatic Fertilizers*

a. *Specifications*

2331 Potash Fertilizers (Bulk to the Buyer)

(1) Potassium Sulfate (K_2SO_4)
Commercial, 50% minimum potash (K_2O), 2.0% maximum Cl, 0.12% maximum H_2O.

(2) Potassium Chloride
Commercial, (Standard or Granular) 60% minimum potash (K_2O), 0.12% maximum H_2O.

2353 Phosphate and Phosphatic Fertilizer (Bulk to the Buyer)

(1) Triple Super-phosphate (Granular) 46% minimum available P_2O_5, 3.5% maximum moisture, 85% minimum water soluble P_2O_5 (percent of available P_2O_5), 3.0% maximum free acid as H_3PO_4.

b. *Evaluation of Bids*: Separate invitations for bids will be issued for fertilizer on an FOB basis and ocean freight. Commodity bids will be married to freight bids so that the evaluation will be based on the lowest landed cost per unit of plant food nutrient as specified in the materials listed in A. 1. a. above.

c. *Fertilizer Condition*: Fertilizer shall be fully cured, solid form chemical fertilizer, conforming to U.S. Federal Specifications. The fertilizer shall be in bulk and delivered at the contracted point of delivery to the buyer in a dry and free flowing condition.

d. *Inspection*: Shipments from source country of bulk fertilizers shall be inspected prior to the loading into vessel and in accordance with the normal customs of the trade by an internationally recognized independent inspection service and analyzed to determine that plant nutrient content, by Association of Official Agricultural Chemists (AOAC) Methods of Analysis, conforms to or is better than the contracted chemical and moisture content. Additionally, inspection shall be made on the physical condition of the

fertilizer. The inspection service shall certify as to the weights delivered to the ocean carrier. Cost of inspection must be included in the offering price and be paid by the supplier. The inspection service shall be acceptable to both the buyer and seller, but will be selected by the buyer.

e. *Additional Documentation Required for Reimbursement*: On copy of inspection certificate by the independent inspection agency affirming that specifications are in accordance with the terms of the underlying contract.

f. *Delivery Date Compliance*: Failure to meet the contracted delivery date will subject the supplier to a penalty as established by OSROK in the pertinent Invitation to Bid. [138-139] g. *Penalty Provision*: Penalties for failure to meet time or commodity specification provisions will be enforced with OSROK standard terms and conditions.

REGULATION 1

AS AMENDED NOVEMBER 1957

INTERNATIONAL COOPERATION ADMINISTRATION

Washington, D. C.

[141]

ICA REGULATION 1*

TITLE 22—FOREIGN RELATIONS

Chapter II—International Cooperation Administration, Department of State

PART 201—PROCEDURES FOR FURNISHING ASSISTANCE TO COOPERATING COUNTRIES

§ 201.1 Definition of terms.
(A) "The act"...
(B) "ICA"...
(C) "The Director"...
(D) "Cooperating country"...
(E) "USOM"...
(F) "The Director, USOM"...
(G) "Banking institution in the United States"...
(H) "Approved applicant"...
(I) "Reimbursement"...
(J) "Delivery"...
(K) "Importer"...
(L) "Supplier"...
(M) "Source"...
(N) "Commission"...
(O) "Discount"...
(P) "Project"...

§ 201.2 What this part does.
(A) Subpart A
(1) Non-project-type assistance.
(2) Project-type assistance.
(B) Subpart B
(C) Subpart C
(D) Subpart D
(E) Subpart E

Subpart A—Authorization Procedure

§ 201.3 Non-project type assistance: Allotments, procurement authorization applications, procurement authorizations and subauthorizations.
(A) Allotments and procurement authorization applications.
(B) Procurement authorizations.
(1) Issuance and scope of authorization.
(2) PA numbers.
(C) Commodity codes.
(D) Subauthorizations.

§ 201.4 Project-type assistance: Allotments for projects, project proposals, project agreements and project implementation orders.
(A) Allotments for projects and project proposals.
(B) Project agreements and project implementation orders.
(1) Issuance and scope of authorization.
(2) PIO numbers.
(C) Commodity codes.

§ 201.5 Contracts and deliveries eligible for financing under procurement authorizations and project implementation orders.
(A) Commodity and service PA's and PIO's.
(1) Contracts.
(i) Initial contracting date
(ii) Terminal contracting date
(2) Reporting.
(3) Deliveries.
(4) Inland transportation.
(B) Submission of documentation of delivery.
(C) Ocean transportation PA's or PIO's
(1) Deliveries.
(i) Between initial and terminal delivery dates.
(ii) Fixing of delivery date.
(2) Submission of documentation of delivery.

§ 201.6 General provisions deemed incorporated in PA's and PIO's.
(A) Reimbursement.
(B) Assignment of right to receive reimbursement.
(C) Modification or revocation.
(D) Refund to Director.
(1) Obligation of cooperating country.
(2) Period for making refund demands.
(E) Discounts.
(F) Commissions.
(1) Purchasing agents.
(2) Sales agents.
(G) Adjustment refunds and adjustment credits.
(1) Requirements for credit to ICA.
(2) Notice to ICA from supplier.
(H) Insurance.
(1) Eligibility for ICA financing.
(2) Advice to insurer of PA or PIO number.
(3) Instructions by cooperating country to importer.
(4) Documentation for reimbursement of premiums.
(5) Anti-discrimination requirement.
(I) Airmail distribution of ocean bills of lading.
(J) Price limitations.
(K) Export licenses.
(L) Diversions.
(1) Agreement by cooperating country and importer.
(2) ICA financial responsibility.
(3) Rights of holder of letter of commitment.
(M) Re-export.
(N) U. S. flag vessel shipping requirement.
(1) Scope of cooperating country responsibility.
(2) Non-availability of U. S. flag vessels.
(O) Transportation limitations.
(P) Special provisions.

§ 201.7 Ocean Transportation.
(A) Eligibility for ICA financing.
(1) ICA-financed cargos.
(2) Non-ICA financed cargos.
(B) Rate limitations.
(C) Reimbursement.
(1) Dry bulk cargo shipments.
(i) Costs under charter party.
(ii) Loading, trimming and related costs.

(iii) Demurrage and dispatch earnings.
(iv) Brokerage and address commissions.
(2) Dry cargo liner shipments.
(i) Costs under conference rates.
(ii) Related shipping costs.
(3) Tanker shipments.
(i) Costs under charter parties or contracts.
(ii) Related shipping costs.
(D) Prior review of charter parties by ICA.
§ 201.8 Ships' dollar disbursements.
§ 201.9 Procurement by U. S. Government agencies.

Subpart B—Responsibilities of Importers & Suppliers

§ 201.10 Information to be furnished by importer to supplier.
(A) Duty of importer.
(B) Duty of supplier.
§ 201.11 Contracts and deliveries.
§ 201.12 Marking requirements.
(A) Affixation of ICA emblem and authorization numbers.
(1) Size of emblem.
(2) Color of emblem.
(B) Exception to requirement.
(1) For certain commodities.
(2) For other commodities upon approval by ICA.
§ 201.13 Information for Office of Small Business/ICA.
(A) Notice of proposed procurement.
(B) Waiting period.
(C) Notice of formal bid invitations and waiting period.
(D) Waiting periods where incomplete notice furnished.
(E) Exception to notice requirement for agricultural commodities.
(F) Notice of bids received.
(1) When bids received on basis of formal invitation.
(2) When bids received on basis other than formal bid invitations.

Subpart C—Reimbursement for Assistance

§ 201.14 Types of reimbursement.
(A) Direct reimbursement.
(B) Letters of Commitment to United States banks.
(C) Letters of Commitment to United States suppliers.
(D) Charges to allocations to other U. S. Government agencies.
§ 201.15 Reimbursement for specific procurement payments by a cooperating country.
§ 201.16 Letter of commitment to a banking institution.
(A) Nature and purpose.
(B) Documentation for payment.
(C) General provisions deemed incorporated in letter of commitment.
(1) Form and terms of letter of credit.
(2) Conditions for reimbursement.
(i) Certification of payee.
(ii) Non-responsibility of bank for supplier statements in ICA Form 230.
(3) Documents for ICA.
(4) Form of reimbursement.
(5) Protection of bank making payment.
(6) Rights of bank where PA or PIO modified.
(7) Reimbursement under bank certificate.
(8) Successors and assigns.
§ 201.17 Letter of commitment to a supplier.
(A) Nature and purpose.
(B) Assignment of monies receivable.
(C) Documentation for payment.
§ 201.18 Documents required for reimbursement.
(A) For cost of commodity.
(1) Voucher SF-1146.
(2) Supplier's certificate.
(i) Coverage:
(a) Cost of commodity.
(b) Cost of ocean freight.
(c) Cost of marine insurance.
(ii) Special provision in case of direct reimbursement to cooperating country.
(3) Evidence of shipment.
(i) Bill of lading or substitute.
(ii) Tanker shipments.
(iii) Bank certificate for shipments from United States.
(a) Shipment document sent by bank.
(b) Shipment document held by bank.
(iv) Bank certificate for shipments from outside United States.
(4) Supplier's invoice.
(5) Additional or substitute documents.
(B) For cost of ocean freight.
(1) Voucher SF-1146.
(2) Supplier's certificate.
(3) Charter party or contract of affreightment.
(4) Bill of lading or other evidence of shipment.
(5) Supplier's invoice.
(6) Additional or substitute documents.
(C) For cost of services.
(1) Voucher SF-1146.
(2) Supplier's certificate.
(3) Supplier's invoice and works progress certificate.
(4) Documents where service supplier reimbursement includes travel, material, or equipment costs.
(i) Vendors' invoices.
(ii) Bill of lading or other evidence of shipment.
(5) Certificate of performance.
(6) Additional or substitute documents.
(D) Supplier's certificate and invoice-and-contract abstract.
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(i) Transactions included.
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(i) Transactions included.
(ii) Price limitation.
(a) Domestic price base.
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(2) Supplier's non-comparable sales.
(3) Competitor's comparable sales.
(b) Export differential.
(1) Supplier's comparable sales.
(2) Competitor's comparable sales.
(iii) Non-recognition of excessive export differential.
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(i) Transactions included.
(ii) Price limitation
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(1) Domestic price of manufacturer, producer or processor.
(2) Domestic price of other manufacturers, producers or processors.
(3) Supplier's cost of acquisition.
(b) Export differential.
(1) Supplier's comparable sales.
(2) Competitor's comparable sales.
(iii) Non-recognition of excessive export differential.
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(c) Special meaning of "price".
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§ 201.22 Responsibilities of banking institutions in connection with letters of commitment issued to them.
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(D) Delivery.
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(1) Reliance by bank on supplier's certificate.
(2) Provisions beyond bank responsibility.
(J) Ocean transportation.
(K) Contracting and reporting under PA's and PIO's.
(L) Responsibility of importers and suppliers.
(M) Bank letter of commitment; expiration in letter of credit transactions.
(N) Bank letter of commitment; payment to third persons.
(O) Bank unable to deliver or send non-negotiable document to forwarding agent under § 201.18 (a) (3).

Subpart F—Waiver Authority and Transitory Provisions

§ 201.23 Waiver and amendment authority.
§ 201.24 Continuation in effect of certain prior issuances.
§ 201.25 Transitory provision.

AUTHORITY: §§ 201.1 to 201.23 issued under sec. 525, 68 Stat. 856, as amended; 22 U. S. C. 1785. Interpret or apply secs. 131, 132, 201, 502, 504, 509, 510, 522, 68 Stat. 838, as amended, 840, as amended, 841, 851, 853, as amended, 855; 22 U. S. C. 1756, 1761, 1762, 1782, 1841, 1842, 1871, 1892.

[144] § 201.1 Definition of Terms. For the Purposes of This Part:

(A) "The act" means the Mutual Security Act of 1954 (Pub. Law 665, 83d Cong.), as amended.

(B) "ICA" means the International Cooperation Administration, including, when applicable, each USOM (paragraph (E) of this section).

(C) "The Director" means the Director of the International Cooperation Administration or the Deputy Director or any person authorized to perform the functions of the Director or Deputy Director in respect of this part.

(D) "Cooperating country" means any country in which ICA has a program under the act.

(E) "USOM" means the ICA mission to any cooperating country.

(F) "The Director, USOM" means the head of the ICA mission to any cooperating country or the Deputy Director of any such mission or any person authorized to perform the functions of the Director or Deputy Director, USOM, in respect of this part.

(G) "Banking institution in the United States" means a banking institution organized under the laws of the United States, any State, territory or possession thereof, or the District of Columbia.

(H) "Approved applicant" means the cooperating country or any person or organization, governmental or otherwise, named as approved applicant in any letter of commitment issued to a banking institution in the United States pursuant to Subpart C of this part; and shall include any agent authorized to act on behalf of an approved applicant.

(I) "Reimbursement" means any of the methods set forth in Subpart C of this part used by ICA to pay for any commodity or service furnished to a cooperating country under the act.

(J) "Delivery" means the transfer to or for the account of a cooperating country of custody and right of possession of any commodity or the rendering to or for the account of a cooperating country of any service.

(K) "Importer" means any person or organization, governmental or otherwise, to which a cooperating country has made a subauthorization (see § 201.3 (D), or which has been designated as an "authorized agent" in a project implementation order (called "PIO" in this part) or subauthorized by any such authorized agent (see § 201.4).

(L) "Supplier" means any person or organization, governmental or otherwise, which furnishes any commodity or service under the act.

(M) "Source" means the country or area from which a commodity is shipped to the cooperating country. Where, however, a commodity is shipped from a free port or bonded warehouse in the form in which received therein, "source" shall mean the country or area from which the commodity was shipped to the free port or bonded warehouse.

(N) "Commission" means any sum paid or to be paid to an agent, broker, or other representative in connection with a sale financed by ICA.

(O) "Discount" means that amount by which the supplier's gross sales price is reduced by a credit, refund or other allowance made or to be made to the buyer or consignee.

(P) "Project" means a single integrated undertaking or enterprise within a cooperating country, which has been mutually agreed upon by ICA and the cooperating country government and which requires financing by ICA of services and/or commodities specifically needed for the accomplishment of the undertaking or enterprise.

§ 201.2 What This Part Does—

(A) Subpart A.

(1) Non-project type assistance. Subpart A of this part describes the procedures for enabling cooperating countries to use ICA funds to get commodities and services under the act. Subpart A is divided into two broad categories. The first category deals with the authorization procedures for procurement of commodities and services in non-project type assistance programs. In general, it provides for the submission of procurement authorization applications by cooperating countries and the issuance

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of procurement authorizations (called "PA's" in this part) by ICA and subauthorizations thereunder by cooperating countries.

(2) Project type assistance. The second broad category deals with the authorization procedures for the procurement of commodities and services required for projects. In general, it provides for the development of a project proposal jointly by the cooperating country and the applicable USOM, the execution of a project agreement between the cooperating country and ICA, and the issuance of PIO's thereunder. PIO's may be issued for various segments of a project but the only PIO's subject to this part (except where otherwise indicated in the applicable PIO's) are those PIO's which provide for the procurement of those commodities and services covered by the ICA Commodity Code Book.

(B) Subpart B. In general, the fact that a particular purchase is to be paid for by ICA will not basically affect the way in which an importer or supplier does business. Subpart B of this part, however, describes certain things which an importer must do when he has been told that he is buying under the act, and which a supplier must do when he obtains an order that is to be paid with ICA funds.

(C) Subpart C. Subpart C of this part describes the procedures for obtaining reimbursement for assistance furnished under the act.

(D) Subpart D. Subpart D of this part contains the price provisions applicable to purchases of commodities that are to be paid with ICA funds.

(E) Subpart E. Subpart E of this part describes the responsibility of banking institutions in the United States in connection with letters of commitment issued to them by the Director.

SUBPART A—AUTHORIZATION PROCEDURE

§ 201.3 Non-Project Type Assistance: Allotments, Procurement Authorization Applications, Procurement Authorizations and Subauthorizations—

(A) Allotments and procurement authorization applications. ICA will from time to time determine an amount of ICA funds to be allotted for various cooperating countries for non-project type assistance, to be available for the purchase of commodities and services. From time to time the cooperating country will indicate on PA applications the dollar and/or local currency amounts of the commodities and services which the cooperating country desires to procure with its allotted funds. Supplementary information with respect to PA applications may be required from time to time.

(B) Procurement authorizations—

(1) Issuance and scope of authorization. ICA will review each PA application to determine that the proposed purchases of commodities and services for delivery to the cooperating country are in accordance with the objectives of the act. Upon such a determination, ICA will, as soon as practicable, issue appropriate PA's for acceptance by the cooperating country. These PA's will cover the commodities and services for the purchase of which the cooperating country may make subauthorizations to importers, and will specify the maximum dollar and/or local currency amounts which ICA will finance, the source from which the commodities and services (other than ocean transportation) are to be obtained, the periods during which contracts and/or deliveries are to be made, and any other provisions deemed necessary by ICA. Each PA will bear a PA number, and the issuance of a PA will constitute authority to the cooperating country to subauthorize its importers to use the procurement authorization number in placing orders for the purchase of the commodities and services specified in the procurement authorization to be delivered to the cooperating country. Cooperating countries may request ICA to make changes in PA's.

(2) PA numbers. PA numbers will indicate the cooperating country to which the authorization is given, the commodity code number, the source from which the commodity or services are to be obtained, and a serial number. An example of a PA number is as follows:

40	010	00	5001
Cooperating country	Commodity code	Source	Serial No.
Greece	Bread Grains	U. S. and Possessions ...	.....

[146] (C) Commodity codes. PA applications will be made in terms of the ICA Commodity Codes which are listed in the official ICA Commodity Code Book, as revised July 1, 1952, or in subsequent revisions. Authorization will normally be made in the same commodity codes, but in certain instances the PA may be restricted to one or more commodities within a commodity code.

(D) Subauthorizations. For all procurement under PA's, the cooperating country will make subauthorizations to importers within the terms of the PA's. The cooperating country, in subauthorizing, will instruct the importer to use the PA number in placing orders, and will specify to importers the commodities or services, source, applicable currency, periods during which contracts and deliveries must be made, and all of the special provisions of the PA which are applicable to the subauthorization.

§ 201.4 Project Type Assistance: Allotments For Projects, Project Proposals, Project Agreements and Project Implementation Orders—

(A) Allotments for projects and project proposals. Apart from the allotments referred to in § 201.3 (A), ICA will from time to time determine an amount of ICA funds to be allotted for project purposes. From time to time project proposals developed jointly by the applicable USOM and the cooperating country will be prepared showing the nature of the project and the dollar and/or local currency amounts of commodities and services needed for the project.

(B) Project agreements and project implementation orders—

(1) Issuance and scope of authorization. ICA will review each project proposal to determine that the proposed project and purchases of commodities and services for the project are in accordance with the objectives of the act, and, upon such a determination, ICA will, as soon as practicable, enter into an appropriate project agreement with representatives of the cooperating country. The project agreement will describe the nature of the project, indicate amounts of funds by currency allocated to the project by ICA and the cooperating country, respectively, the duration of the agreement, and such other provisions as may be deemed necessary by ICA. Procurement for the project of commodities and services covered by the ICA Commodity Code Book shall, unless otherwise provided, be made only upon issuance of a PIO and in accordance with the terms of the PIO issued by ICA in Washington, D. C. or the applicable USOM and accepted by the cooperating country representative. With regard to the use of ICA funds, these PIO's will cover the commodities and services to be procured for the project, will designate the importers authorized to purchase such commodities and services therefor, and will specify the maximum dollar and/or local currency amounts which ICA will finance, the source from which the commodities and services (other than ocean transportation) are to be obtained, the periods during which contracts and/or deliveries are to be made, and any other provisions deemed necessary by ICA. Each PIO will have a PIO number, and the issuance of a PIO will constitute authority to importers to use the PIO number in placing orders for the purchase of the commodities and services specified in the PIO to be delivered to the project on behalf of the cooperating country. Cooperating countries may request ICA to make changes in any PIO.

(2) PIO numbers. PIO numbers will indicate the applicable cooperating country, the field of activity (e.g., public health, education), the project number, and a serial number. An example of a PIO number is as follows:

65 Cooperating country	23 Activity	001 Project No.	550001 Serial No.
Iran	Industry (cement plant) ...	.....	.....

(C) Commodity codes. Commodities and services needed for projects will be indicated on project proposals in terms of the ICA Commodity Codes which are listed in the official ICA Commodity Code Book, as revised July 1, 1952, or in subsequent revisions.

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§ 201.5 Contracts and Deliveries Eligible for Financing Under Procurement Authorizations and Project Implementation Orders—

(A) Commodity and service PA's and PIO's—

(1) Contracts—

(i) Initial contracting date. Contracts for the purchase of commodities and services will not be eligible for financing under a PA or PIO if made prior to the date of issuance, or in the event that an initial contracting date is specified, if made prior to the specified date.

(ii) Terminal contracting date. PA's and PIO's will indicate, in addition to an initial contracting date, a terminal contracting date. The terminal contracting date will normally be three to six months subsequent to the first day of the month following the month in which the PA or PIO is issued. In making subauthorizations under a PA or PIO the cooperating country or authorized agent, as the case may be, must specify that contracts under the subauthorizations must be made on or before the terminal contracting date. Contracts made after the terminal contracting date will not be eligible for financing under the PA or PIO unless deliveries under such contracts are made within the specified delivery period (see subparagraph (3) of this paragraph).

(2) Reporting. With respect to PA's only, the cooperating country shall, in accordance with instructions issued by ICA, report within 30 days after the terminal contracting date the total or estimated total value of all contracts entered into pursuant to subauthorizations made under the PA, whether or not deliveries have actually been made. If the total or estimated total value of such contracts, as so reported, is less than the total dollar and/or local currency amount of the PA, the PA will be reduced by the amount of the difference. If no such report is filed by the cooperating country within 30 days after the terminal contracting date, ICA will assume that the PA has been fully subauthorized and contracted for, and no reduction in the PA will be made.

(3) Deliveries. Each PA or PIO will also state a delivery period. The period will be indicated normally by two dates: (i) The date before which deliveries may not be made (initial delivery date) and (ii) the date on or before which deliveries must be made (terminal delivery date). Where, however, an initial delivery date is not specified, the date of issuance of the PA or PIO shall be deemed to be the initial delivery date. Deliveries made before the initial delivery date or after the terminal delivery date will not be eligible for ICA financing under the PA or PIO. ICA may extend the terminal delivery date for limited periods on an individual contract basis, if the contract was made on or before the terminal contracting date.

(4) Inland transportation. Inland transportation other than within the cooperating country (except to the first port of entry) will be eligible for financing under commodity and service PA's or PIO's provided that such transportation services are delivered on or after the initial delivery date and on or before the terminal delivery date specified on the PA or PIO. The date of delivery of inland transportation services shall be deemed to be the date of the related railway, barge, truck or airway bill of lading, submitted under § 201.18.

(B) Submission of documentation of delivery. In the case of reimbursement by letter of commitment to a bank, the submission of documentation shall be in accordance with § 201.16 (C) (2). In the case of other types of reimbursement, proper documentation of deliveries, in accordance with § 201.18 (B) must be presented within 90 days after the latest date on which deliveries may take place under the PA or PIO, to the Controller, ICA, Washington, D. C., or to the appropriate USOM Controller if so specified in the PA or PIO.

(C) Ocean transportation PA's or PIO's. Ocean transportation PA's or PIO's will not be subject to the provisions of paragraphs (A) and (B) of this section, but will be subject to the following provisions:

(1) Deliveries—

(i) Between initial and terminal delivery dates. Delivery of ocean transportation services may be made at any time on or after the initial delivery date and on or before the terminal delivery date specified on the PA or PIO.

(ii) Fixing of delivery date. The date of delivery of ocean transportation services

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shall be deemed to be the date of the related bill of lading, airway bill, or the cablegram alternatively submitted under § 201.18.

(2) Submission of documentation of delivery. In the case of reimbursement by letter of commitment to a bank, the submission of documentation shall be in accordance with § 201.16 (C) (2). In the case of other types of reimbursement, proper documentation in accordance with § 201.18 (B) must be presented, within 120 days after the date of the bill of lading covering ocean shipment, to the Controller, ICA, Washington, D. C. or to the appropriate USOM Controller if so specified in the PA or PIO.

§ 201.6. General Provisions Deemed Incorporated in PA's and PIO's. Each PA or PIO issued shall be deemed to incorporate the following provisions:

(A) Reimbursement. Upon receipt of the documents required for reimbursement by this part, ICA will make reimbursement up to the amount specified in the PA or PIO for the assistance described in the PA or PIO, such reimbursement to be made by any one of the methods prescribed in Subpart C of this part.

(B) Assignment of right to receive reimbursement. The right to receive reimbursement under a PA or PIO may be assigned, in whole or in part, to a banking institution in the United States, but no such assignment shall be valid unless the proposed assignee has been named in a letter of commitment or otherwise approved by the Director or a Director, USOM.

(C) Modification or revocation. The Director with respect to a PA or PIO, and a Director, USOM, with respect to a PIO, reserves the right at any time and from time to time, and for any reason or cause whatsoever, to supplement, modify, or revoke any PA or PIO (including termination of deliveries under the PA or PIO). In the event of any supplement, modification, or revocation, the right of reimbursement will be modified or terminated accordingly, except that if a letter of commitment has been issued, the rights of the holder of any such letter of commitment shall not be affected except to the extent specified in such letter of commitment.

(D) Refund to Director—(1) Obligation of cooperating country. The cooperating country will pay promptly to the Director upon demand the entire amount reimbursed (or such lesser amount as the Director may demand) whenever full documentation is not furnished within the specified time, or whenever it appears to the Director that the documentation submitted by or on behalf of the cooperating country (or any approved applicant named in a letter of commitment) does not support the expenditure for which the reimbursement was made, or whenever the Director determines that the reimbursement was improper as being in violation of any of the provisions of the act, any acts amendatory thereof or supplemental thereto, any relevant appropriation acts, or any rules, regulations or procedures of ICA promulgated under any of said acts.

(2) Period for making refund demands. Demands for refunds from cooperating countries under this part may be made by the Director within five years after the date of reimbursement by ICA.

(E) Discounts. If a contract for which reimbursement is claimed provides for one or more discounts, only the invoice amount after discount (seller's gross price less all discounts) will be eligible for reimbursement.

(F) Commissions—(1) Purchasing agents. No commission paid or to be paid to an agent, broker or other representative of an importer will be eligible for reimbursement.

(2) Sales agents. A commission paid or to be paid to an agent, broker, or other representative of the supplier (domestic or foreign) is not prohibited and will be eligible for reimbursement. However, if the amount of any such commission exceeds the amounts paid by the supplier's competitive sellers or exceeds the amounts paid by the supplier in comparable sales, the Director may, subsequent to reimbursement, request repayment from the importing country of the amount of such commission. The amount of such commission shall be fully reported by the supplier on ICA Form 280 (see § 201.18 (D)). A payment, credit, or other allowance to a foreign distributor of a supplier, in connection with direct imports by such a distributor for his own account, however, is not to be considered as an agent's commission but as a discount, as defined in paragraph (E) of this section, and must be deducted from the gross amount of the supplier's invoice.

[149] (G) Adjustment refunds and adjustment credits—

(1) Requirements for credit to ICA. If an importer receives an adjustment refund, or an adjustment credit, arising out of the terms of a contract or out of the normal customs of the trade, the Director will, in making reimbursement directly to a cooperating country, withhold the amount of such refund or credit; in case of other types of reimbursement, the Director will request repayment of the amount of such refund or credit from the cooperating country.

(2) Notice to ICA from supplier. Upon settlement of a claim for an adjustment refund or an adjustment credit, the supplier shall immediately give written notice to the Controller, ICA, Washington, D. C., indicating the PA or PIO number, the name and address of the importer, the date and amount of the original invoice, and the reason for the refund or credit and the amount thereof.

(H) Insurance—

(1) Eligibility for ICA financing. Dollar payments of premiums for ocean marine insurance (including war risk insurance) on ICA-financed commodities procured in the United States will be eligible for financing by ICA under a commodity PA or PIO if such insurance is:

(i) Placed by the importer (or by the supplier or any other person if authorized so to do by the importer in a cable, written document, or the letter of credit); and

(ii) Placed at the lowest available competitive rate.

(2) Advice to insurer of PA or PIO number. The importer, supplier, or other person placing such insurance shall furnish the PA or PIO number to the insurer.

(3) Instructions by cooperating country to importer. In authorizing or subauthorizing procurement under a commodity PA or PIO, the cooperating country will instruct each importer that, with respect to commodities procured in the United States pursuant to the PA or PIO, dollar funds made available under the authorization or subauthorization may, at the election of the importer, be used to purchase in the United States marine insurance for such commodities.

(4) Documentation for reimbursement of premiums. As documentation to support ICA reimbursement for marine insurance dollar premiums, the insurer, insurance broker, or underwriter will execute a supplier's certificate (Form ICA-280) in accordance with § 201.18 (A) (2) (i) (c).

(5) Anti-discrimination requirement. In the event a cooperating country, by statute, decree, rule or regulation, discriminates with respect to ICA-financed procurement against any marine insurance company authorized to do business in any State of the United States, then commodities procured in the United States with ICA funds, destined for such country, and insured against marine risk, shall be so insured in the United States with a company or companies authorized to do a marine insurance business in any State of the United States.

(I) Airmail distribution of ocean bills of lading. The cooperating country or authorized agent will instruct importers to advise shippers to airmail at the time of loading one copy (or photostat) of ocean or charter party bill of lading or airway bill to the Controller, USOM, American Embassy, in the capital city of the cooperating country receiving the shipment.

(J) Price limitations. ICA will not make reimbursement directly to a cooperating country for the purchase in bulk of any commodities at prices higher than the market price prevailing in the United States, adjusted as provided in § 201.20, nor will ICA make reimbursement directly to a cooperating country for a purchase of any commodity at a price higher than the price calculated in accordance with the applicable price provisions in § 201.21; in cases of other types of reimbursement, the Director will demand repayment from the cooperating country of the entire amount so reimbursed.

(K) Export licenses. Where procurement is effected in the United States for any commodity covered by a PA or PIO, export licenses, to the extent required, must be obtained from the U. S. Department of Commerce. All exports from the United States of commodities furnished under the act are subject to such export quotas as may be established and such export license controls as may be exercised by the U. S. Department of Commerce.

(L) Diversions—

(1) Agreement by cooperating country and importer. The cooperating country agrees, and, as a condition of the receipt by an importer of authority to use the PA or PIO in placing orders,

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the importer shall be deemed to have agreed, that, upon a determination by the Director that such action is necessary to accomplish the purposes of the act, ICA shall be vested with title to ICA-financed commodities which have been delivered but not then off-loaded in ports of the cooperating country, and the cooperating country will, upon such determination, assign, execute and furnish, or cause to be assigned, executed and furnished, to ICA documents requested by ICA relating to such ICA-financed commodities including, but not limited to, negotiable bills of lading, supplier's invoices, packing lists and inspection certificates. The Director is authorized to take such action with respect to such commodities as he may deem necessary and proper including, without limiting the generality of the foregoing, the following: (i) To direct masters of vessels carrying such commodities to divert them from the designated ports of destination to such other ports as may be designated by ICA, and (ii) to cause to be inserted in relevant charter parties, bills of lading and other shipping documents a diversion clause substantially in the following form:

ICA may designate an alternate port of discharge within the range of ports covered by the applicable conference tariff. Diversion charges as per tariff to apply including deviation insurance and extra handling cost if incurred.

(2) ICA financial responsibility. In the event of any such determination by the Director and action taken pursuant to subparagraph (1) of this paragraph, ICA will, subject to availability of funds therefor, assume responsibility for extra costs of transportation services (including, where applicable, marine insurance and extra handling costs) caused by such action but ICA shall not be subject to any liability to the cooperating country, its importers or the approved applicant, except for the payment of such costs as ICA, in its sole discretion, may deem appropriate under the circumstances.

(3) Rights of holder of letter of commitment. Notwithstanding the foregoing subparagraphs (1) and (2) of this paragraph, if a letter of commitment has been issued, the rights of the holder of any such letter of commitment shall not be affected except to the extent specified in such letter of commitment.

(M) Re-export. The re-export of commodities financed by ICA, within three years of the date of reimbursement therefor, in the form or substantially in the form received, except as authorized by ICA, is not permitted, and in the event of any unauthorized re-export the cooperating country will pay promptly to the Director upon demand the entire amount reimbursed or such lesser or greater amount as the Director may deem appropriate under the circumstances of the particular transaction, not to exceed, however, the amount realized from the sale of any such commodity.

(N) U. S. flag vessel shipping requirement—

(1) Scope of cooperating country responsibility. The cooperating country will ensure that at least 50 percent of the gross tonnage of all ICA-financed commodities transported to it on ocean vessels during each U. S. fiscal year as well as each quarterly period thereof is transported on privately-owned U. S. flag commercial vessels. The foregoing requirement applies separately for dry bulk carrier shipments, dry cargo liner shipments, and tanker shipments and also applies separately for shipments (i) from the U. S.; (ii) from Europe and Africa; (iii) from the area of the Near East and South Asia; (iv) from Latin America and Canada; and (v) from the area of the Far East. If the foregoing requirement is not met with respect to shipments made during any fiscal year or quarter thereof, the cooperating country will pay promptly to the Director upon demand whatever amount, reimbursed by ICA for commodities, marine insurance, and transportation in shipments directed to the cooperating country during that period of time, as the Director in his discretion shall consider necessary to effect a compliance by the cooperating country with the foregoing requirement for that period of time.

(2) Non-availability of U. S. flag vessels. Any cooperating country may at any time apply to the Office of Transportation, ICA, Washington, D. C., for an administrative determination with respect to any proposed shipment that no privately-owned U. S. flag commercial vessel is available for such shipment at fair and reasonable rates for such a vessel. In the event that the Office of Transportation shall make such a determination of non-availability, it will advise the cooperating country thereof. Tonnage involved in any or all shipments included in the determination of non-availability of U. S. flag vessels may or may not be excluded from the total tonnage of the fiscal year and the relevant quarter thereof for at least 50 percent of which the cooperating country must ensure transportation

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on U. S. flag vessels. The determination concerning such exclusion shall be made by the Office of Transportation after a review of all pertinent factors relating to all ICA-financed shipments to the cooperating country during the relevant fiscal year and quarterly period, and the cooperating country shall be advised thereof by the Office of Transportation.

(O) Transportation limitations. ICA will not finance commodities or the transportation thereof which are shipped to cooperating countries by any transportation medium owned, operated or under the control of any country not included within the meaning of Code 99 as defined in the ICA Geographic Code Book (as amended).

(P) Special provisions. The provisions of this section may be waived, amended or supplemented by special provision in the PA or PIO, or otherwise, pursuant to § 201.23.

§ 201.7 Ocean Transportation—

(A) Eligibility for ICA financing. Ocean transportation PA's and, in the case of shipments where the supplier pays the ocean freight either for his own or the buyer's account, the PA's or PIO's for the commodity involved, may be used by the cooperating country to cover dollar and/or local currency services furnished in connection with the shipment to the cooperating country of:

(1) ICA-financed cargoes. (i) On flag vessels of countries included within the meaning of Code 99 as defined in the ICA Geographic Code Book (as amended) but excluding those of the cooperating country, (ii) where ICA dollar reimbursement is requested, to the extent that payment for such services is made in dollars in accordance with the custom of the trade, or, if not in accordance with the custom of the trade, only if approved by the Office of Transportation, ICA, Washington, D. C.; and (iii) where ICA local currency reimbursement is requested, to the extent that payment for such services is made in the specified local currency in accordance with the custom of the trade or other acceptable local currencies.

(2) Non-ICA financed cargoes.

(i) On United States flag vessels.

(ii) On flag vessels of countries included within the meaning of Code 99 as defined in the ICA Geographic Code Book (as amended), but excluding the United States or the cooperating country, but only in special circumstances where specifically authorized in writing by ICA to do so pursuant to a request in writing.

(B) Rate limitations. The rate charged by a supplier of ocean transportation services shall not exceed the prevailing rate for similar freight contracts nor the rate paid to the supplier for similar ocean transportation services by other customers similarly situated.

(C) Reimbursement. Reimbursement will be made as follows:

(1) Dry bulk cargo shipments—

(i) Costs under charter party. Reimbursement will be made for cost of shipment from ports of loading to ports of discharge at rates established by charter parties.

(ii) Loading, trimming and related costs. Reimbursement for loading, trimming and other related shipping expenses may be made when such expenses are not for the account of the ship nor included in inland transportation charges.

(iii) Demurrage and dispatch earnings. Reimbursement will not be made for demurrage incurred in excess of dispatch earnings. Amounts earned for dispatch shall be credited first against demurrage, if any, incurred in connection with the same voyage; the balance supported by the vessel's signed laytime statement(s), shall then be refunded to the Controller, ICA, Washington, D. C., within 90 days after date of discharge of the cargo on which dispatch was earned.

(iv) Brokerage and address commissions. No brokerage commissions in excess of 2½ percent of the freight and no address commission will be eligible for reimbursement; the names of all persons participating in the eligible brokerage commission must be indicated on the charter party.

(2) Dry cargo liner shipments—

(i) Costs under conference rates. Reimbursement will be made for cost of shipment

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from ports of loading to ports of discharge at the rates indicated in the bill of lading, but not in excess of the conference rates for such services.

(ii) Related shipping costs. Reimbursement for related shipping expenses may be made when such expenses are not for the account of the ship nor included in inland transportation charges.

(3) Tanker shipments—

(i) Costs under charter parties or contracts. Reimbursement will be made for cost of shipment from ports of loading to ports of discharge at rates established by charter parties or contracts of affreightment.

(ii) Related shipping costs. Reimbursement for related shipping expenses may be made when such expenses are not for the account of the ship nor included in inland transportation charges.

(D) Prior review of charter parties by ICA. All charters (whether single voyage charters, or consecutive voyage charters, or time charters) of all vessels must be submitted to the Office of Transportation, ICA, Washington, D. C., for prior review and approval.

§ 201.8 Ships' Dollar Disbursements. Ships' dollar disbursement PA's may be authorized by ICA in special circumstances and may be used by the cooperating country to cover dollar costs of bunker supplies (and bunker trimming) for flag vessels of the cooperating country under rules and procedures to be specified by ICA.

§ 201.9 Procurement by U. S. Government Agencies. When a determination has been made that any commodity or service authorized on a PA or PIO is to be procured by a U. S. Government agency, ICA will authorize the U. S. Government agency to procure the commodity or service in accordance with procedures established for such procurement. In the event that such determination is made prior to the issuance of a PA, ICA may issue a "Procurement Authorization and U. S. Government Agency Purchase Requisition."

SUBPART B—RESPONSIBILITIES OF IMPORTERS AND SUPPLIERS

§ 201.10 Information to be Furnished by Importer To Supplier—

(A) Duty of importer. Each importer must inform his supplier that the transaction is to be financed by ICA, and must give to his supplier the PA or PIO number that has been given to him, together with all instructions given to him by the cooperating country which will affect the supplier in carrying out the transaction, such as, for example, eligible source of commodities, periods during which contracts and deliveries must be made, shipping provisions, and documentation requirements.

(B) Duty of supplier. The supplier must put the PA or PIO number on all documents required for reimbursement (see § 201.18), and, when procurement is effected in the United States, should put the PA or PIO number on his export license application (see § 201.6 (K)). The supplier is required to request the importer to furnish the information described in paragraph (A) of this section.

§ 201.11 Contracts and Deliveries. An importer must comply with the specified contract and delivery dates. A supplier must not accept orders identified by a PA or PIO number unless he expects to comply with the specified contract and delivery dates as notified to him by the importer.

§ 201.12 Marking Requirements—

(A) Affixation of ICA emblem and authorization numbers. All commodities, and their shipping containers, furnished to cooperating countries under ICA-financing (whether from the United States or other source country), must carry the official ICA emblem designed for the purpose. This identification shall be affixed by metal plate, decalcomania, stencil, label, tag, or other means, depending upon the type of commodity or shipping container and the nature of the surface to be marked. The emblems placed on the commodities must be approximately as durable as the trademark or company or brand name affixed by the producer; the emblems on the shipping containers must be legible until they reach the consignee. In addition, the shipping container will indicate clearly the last set of digits of the ICA, PA, PIO, or other authorization number in characters at least equal in height to the shipper's marks.

(1) Size of emblem. The size of the emblem may vary depending upon the size of the commodity, package or shipping container to be marked, but must be large enough to be clearly visible at a reasonable distance.

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(2) Color of emblem. The emblem will appear in the colors shown on the samples available in the Office of Small Business, International Cooperation Administration, Washington 25, D. C., or in the offices of the USOM's in the respective cooperating countries.

(B) Exception to requirement—

(1) For certain commodities. Raw materials (including grain, coal, petroleum, oil and lubricants) shipped in bulk, vegetable fibers packaged in bales, and semifinished products which are not packaged in any way are, to the extent compliance is impracticable, excepted from the marking requirements of this section.

(2) For other commodities upon approval by ICA. If compliance with the provisions of this section is found to be impracticable with respect to other commodities, the cooperating country or supplier will promptly request the Office of Small Business, International Cooperation Administration, Washington 25, D. C., for an exception from the requirements of this section.

(C) Emblem display on ships. The ICA emblem must be prominently displayed on all ships during loading and unloading when their cargoes consist entirely of ICA-financed goods. Instructions relating to display of the emblem by ships will be furnished by the charterers to the carriers with their charter parties.

§ 201.13 Information for Office of Small Business/ICA—

(A) Notice of proposed procurement. To permit ICA, in accordance with section 504 of the act, to give United States suppliers (particularly small independent enterprises) an opportunity to participate in supplying commodities and services financed by ICA, the importer, or anyone acting in his behalf, before placing or agreeing to place any order covered by a subauthorization of more than $5,000, shall, insofar as practicable and to the maximum extent consistent with the accomplishment of the purposes of the act, furnish by registered mail to the Office of Small Business, ICA, Washington, D. C., the following information in the following form in duplicate in the English language with specifications stated in terms of United States standards.

Name and address of importer.	ICA PA or PIO/C number (if known).	Quotations will be accepted until ..... Date
Subauthorization or import license number (if known)	Cabled quotations will ( ) will not ( ) be accepted. If yes, give cable address.	Approximate dollar amount of proposed purchase.

Full description of commodities and services (excluding ocean transportation and marine insurance) to be imported, including sizes, quantities, etc., and any special conditions: .....

.....

(Name of importer)

By .....

(Authorized signature)

(B) Waiting period. The importer or anyone acting in his behalf shall not accept any offer or place any order or agree to accept any offer or place any order under such a subauthorization until after 30 days have elapsed from the time that the information described in paragraph (A) of this section reaches, or in the normal course of the mail would reach, the Office of Small Business, ICA, Washington, D. C. The Office of Small Business may, upon application by the importer or anyone acting in his behalf, waive or reduce the 30-day waiting period where such action is deemed appropriate by the Office of Small Business.

(C) Notice of formal bid invitations and waiting period. When procurement is undertaken on the basis of formal bids, the importer or anyone acting in his behalf, in lieu of furnishing the information described in paragraph (A) of this section, shall transmit so as to be received by the Office of Small Business, ICA, Washington, D. C., at least 30 days before the closing date for bids three copies in the English language of the complete invitation for bids (including specifications according to United States

standards, terms and conditions, the closing hour and date for bids, the applicable invitation number, and the address where invitation forms and complete specifications may be obtained by prospective suppliers). English language copies of the foregoing complete invitation for bids will be furnished free of charge to both the Office of Small Business and, upon their request, to prospective American suppliers. For this purpose, the importer or anyone acting in his behalf at the time he transmits the three aforementioned copies to the Office of Small Business will likewise transmit fifty copies to a place in the United States designated to him by the cooperating country, which place shall be mutually agreed upon by the Office of Small Business and the cooperating country.

(D) Waiting periods where incomplete notice furnished. In all cases where the information or complete invitation for bids required by paragraphs (A) and (C) of this section as received by the Office of Small Business does not fully comply with the requirements of those respective paragraphs, the Office of Small Business will return the same to the sender with instructions for revision and the 30-day period prescribed by paragraph (B) or (C) of this section, whichever is relevant, shall be considered to run from the date the Office of Small Business receives such information or complete invitation to bid as fully complies with the requirements of paragraph (A) or (C) of this section, respectively.

(E) Exception to notice requirement for agricultural commodities. The provisions of paragraphs (A), (B), (C), and (D) of this section shall not apply to imports of agricultural commodities (as included in ICA Commodity Codes 010 through 236 except 220) except as otherwise specifically provided for in any PA or PIO covering agricultural commodities.

(F) Notice of bids received—

(1) When bids received on basis of formal invitation. Where purchases of any commodity (including any agricultural commodity) are made on the basis of formal invitation for bids, the importer or anyone acting in his behalf shall, within 30 days after making the award, furnish the Office of Small Business, ICA, Washington, D. C., an abstract in the English language of the bids showing the names and addresses of all bidders and their principals, if any (including manufacturers or processors of the commodity wherever known); the bids they submitted in terms of commodities, quantity, and prices; and the name and address of the successful bidder or bidders.

(2) When bids received on basis other than formal bid invitations. The abstract shall not be required where purchases are undertaken on any basis other than a formal invitation for bids unless the Office of Small Business, ICA, Washington, D. C., specifically requests such an abstract. In the case of such a request, the importer, or anyone acting in his behalf, shall, within 30 days, furnish the Office of Small Business an abstract in the English language of all price quotations or offers received showing the names and addresses of all offerors and their principals, if any (including manufacturers or processors of the commodity wherever known); the offers they made in terms of commodities; quantity and price; and the name and address of the person or persons with whom the order was placed or agreed to be placed.

SUBPART C—REIMBURSEMENT FOR ASSISTANCE

§ 201.14 Types of Reimbursement. The financing of procurement of commodities or services may be by:

(A) Direct reimbursement. Reimbursement directly to a cooperating country for payments made by it for procurement (see § 201.15);

(B) Letters of commitment to United States banks. Issuance of letters of commitment to banking institutions in the United States, undertaking to make reimbursement for payments made by them to suppliers through commercial letters of credit or otherwise on behalf of a cooperating country or an approved applicant (see § 201.16);

(C) Letters of commitment to United States suppliers. Issuance of letters of commitment to suppliers in connection with specific contracts with or on behalf of a cooperating country providing for payments for commodities or services (see § 201.17);

(D) Charges to allocations to other United States Government agencies. Charges to funds allocated to other departments, agencies, or establishments of the United States Government to cover costs

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incurred in procurement of commodities or services which the Director authorizes from time to time (see § 201.19).

§ 201.15 Reimbursement For Specific Procurement Payments By a Cooperating Country. Reimbursement shall be allowed only for specific payments made by a cooperating country for procurement covered by PA's or PIO's and supported by the documents required for reimbursement by § 201.18.

§ 201.16 Letter of Commitment to a Banking Institution—

(A) Nature and purpose. For the purpose of financing procurement through commercial letters of credit or other forms of bank credit, the Director or a Director, USOM, may, at the request of a cooperating country or its authorized agent, issue a letter of commitment to a banking institution in the United States for the purpose of assuring reimbursement, not in excess of a specified amount in dollars or other specified currency and in accordance with the terms of such letter of commitment, for sight payments made for the account of an approved applicant including sight payments for procurement outside the United States (including its territories and possessions). Any such payment by a banking institution in the United States made in anticipation of a letter of commitment and falling within the scope of payments authorized by such letter when issued will be deemed to be payments to be reimbursed by the Director thereunder. The letter of commitment shall be substantially in the form of Exhibit I,[1] adapted to special circumstances. Each letter of commitment may also be issued with the PA or PIO in one document substantially in the form of Exhibit I-A.[1]

(B) Documentation for payment. Reimbursement under a letter of commitment to a banking institution shall be effected in the amounts specified therein upon presentation of the documents required for reimbursement by § 201.18 and by the letter of commitment.

(C) General provisions deemed incorporated in letter of commitment. Each letter of commitment to a banking institution issued shall be deemed to incorporate the following terms and provisions:

(1) Form and terms of letter of credit. The application or request for, and any agreement relating to, any commercial letter of credit issued or confirmed, or payment made, under a letter of commitment to a banking institution in the United States, may be in such form and contain such terms and provisions as the approved applicant and banking institution may agree upon, and the approved applicant and banking institution may agree to any extension of the life of, or any other modification of, or variation from, the terms of any such letter of credit or any agreement covering payments to be made by the banking institution: Provided, That such terms and provisions and any such extension, modification or variance are in no respect inconsistent with or contrary to the terms and provisions of the letter of commitment, and in case of any inconsistency or conflict, the terms and provisions of the letter of commitment shall control. In any event every application for a letter of credit and every request for payment shall include the substance of the directions as to documentation required for reimbursement by this part.

(2) Conditions for reimbursement. Reimbursement shall be made by the Director promptly (but in no event later than 30 days) after receipt by the Director of the documents required for reimbursement by this part, which documents in normal course should be forwarded to the Director promptly, after the banking institution has made the payment for the amount of which reimbursement is sought.

(i) Certification of payee. The Voucher SF-1034 shall bear the following certification by the payee: "I certify that the above bill is correct and just; that payment therefor has not been received," shall be addressed to the International Cooperation Administration, and shall be signed as "Payee" by the approved applicant, or by the banking institution as agent for and in behalf of the approved applicant.

(ii) Non-responsibility of bank for supplier statements in ICA Form 280. The banking institution shall have no responsibility for the truth or accuracy of the statements contained in the supplier's certificate, or invoice and contract abstract. The right of reimbursement for payments made

[1] Filed with the original document.

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by the banking institution will not be affected by the fact that such abstract may be incomplete, or may indicate non-compliance with any provision of this part, or of the PA or PIO, or of the letter of commitment, or may be inconsistent with other documents required for reimbursement.

(3) Documents for ICA. The banking institution shall make available to the Director, upon request, a copy of each letter of credit issued or confirmed by it, together with any extension or modification thereof; a copy of each application and agreement relating to such a letter of credit, or to a payment instruction or request, together with any extension or modification thereof; a copy of each document in its possession received by it against payment; and detailed advice of the interest, commissions, expenses or other items charged by it in connection with each such letter of credit or payment instruction or request.

(4) Form of reimbursement. Reimbursement to the approved applicant shall be made by check mailed to the banking institution and payable to its order for the account of the approved applicant.

(5) Protection of bank making payment. Acceptance by the banking institution of any document in the ordinary course of business in good faith as being a genuine and valid document and sufficient in the premises, and the delivery thereof to the Director, shall constitute full compliance by the banking institution with any provision of this part, the PA, PIO, or of the letter of commitment requiring delivery of a document of the sort that the document actually so delivered purports to be. The banking institution shall be entitled to receive and retain reimbursement of the amount of all payments made by it against documents so accepted, notwithstanding that such payments may be made in connection with a purchase at a price in excess of the market price prevailing in the United States at the time of the purchase, adjusted for differences in the cost of transportation to destination, quality, and terms of payment, or in excess of the price calculated in accordance with the applicable provisions of §§ 201.7 and 201.21.

(6) Rights of bank where PA or PIO modified.

(i) The Director, with respect to a PA or PIO, and a Director, USOM, with respect to a PIO, reserves the right at any time and from time to time, and for any reason or cause whatsoever, to supplement, modify or revoke the PA or PIO (including termination of deliveries thereunder): Provided, however, That no supplement, modification or revocation shall become effective as to the banking nstitution until the receipt by it from the Director, or a Director, USOM, of written notice of such supplement, modification or revocation, and such supplement, modification or revocation shall in no event affect or impair the right of reimbursement to the extent of any payment made prior to receipt of such notice, or any obligation incurred under an irrevocable letter of credit issued or confirmed prior to receipt of such notice, for which the banking institution has not been repaid by the approved applicant (without, however, any obligation on its part to obtain such repayment). The term "PA" or "PIO" as used in a letter of commitment shall be deemed to include each such supplement or modification from and after receipt by the banking institution from the Director, or a Director, USOM, of written notice of the same, subject always, however, to the foregoing terms and provisions preserving rights of reimbursement in its behalf.

(ii) In the event the Director, or a Director, USOM, shall direct termination of deliveries under the PA or PIO or revoke such PA or PIO or supplement or modify the same in relation to the disposition of any document or documents and shall give the banking institution written notice thereof, the banking institution shall in all respects comply with the instruction of the Director, or a Director, USOM, to the extent it may do so without impairing or affecting any irrevocable obligation or liability theretofore incurred by it under any letter of credit issued or confirmed by it, and it shall be repaid and reimbursed by the Director for the costs, expenses and liabilities paid or incurred by it in relation to such instruction. The banking institution shall have no obligation or liability whatsoever to the approved applicant for anything done or omitted to be done by it pursuant to such instructions of the Director, or a Director, USOM.

(7) Reimbursement under bank certificate. In the event that the banking institution shall file with ICA a certificate as specified in § 201.18 (A) (3) (iii), or a modified certificate as permitted in § 201.22 (O), it shall be repaid and reimbursed by the Director for the costs, expenses and

liabilities paid or incurred by it subsequent to the receipt by ICA of the certificate, as a result either of its following instructions received from the Director, or of its continued holding of documents pending the receipt of such instructions.

(8) Successors and assigns. The letter of commitment shall inure to the benefit of the banking institution's legal successors and assigns.

§ 201.17 Letter of Commitment to a Supplier—

(A) Nature and purpose. For the purpose of financing specific procurement contracts, the Director or a Director, USOM, may, at the request of a cooperating country or its authorized agent, issue a letter of commitment to a supplier assuring reimbursement under such contract not in excess of a specified amount of dollars and/or local currency. The letter of commitment will be issued only in connection with a specific contract, will specify that PA or PIO under which it is issued, and will contain such further provisions as may be required by the Director or a Director, USOM.

(B) Assignment of monies receivable. The monies due or to become due under such letter shall be assignable by the supplier only through signing of the certification in the space provided on the letter, and only to a banking institution in the United States. If a notice of assignment is sent to the Director and the Department of the Treasury under the Assignment of Claims Act of 1940, as amended, such notice shall not be effective unless the date and fact of such notice is indicated on the letter of commitment.

(C) Documentation for payment. Reimbursement under a letter of commitment to a supplier shall be effected in the amounts specified therein upon presentation of the documents required for reimbursement by § 201.18 and the letter of commitment.

§ 201.18 Documents Required for Reimbursement. Claims for reimbursement must be supported by the following documents (each of which must be identified by the appropriate PA or PIO number), except when and to the extent specifically waived in writing by the Director, or a Director, USOM:

(A) For cost of commodity. For cost of any commodity including the costs of freight and/or marine insurance where the supplier pays such costs either for his own or the buyer's account under a commodity PA or PIO:

(1) Voucher SF-1146. Voucher SF-1146 in original and three copies, to be prepared by the supplier or his assignee where a letter of commitment is issued by ICA to the supplier; or, in other cases, by the cooperating country, by the approved applicant, or by the banking institution as assignee, or as agent for and in behalf of the approved applicant.

(2) Supplier's certificate—

(i) Coverage. Supplier's certificate, in triplicate, with invoice-and-contract abstract on reverse side (Form ICA-280), set out in paragraph (D) of this section, covering the following:

(a) Cost of commodity. The cost of the commodity, including the costs of ocean freight and/or marine insurance when such costs are paid by the supplier for his own or the buyer's account under a commodity PA or PIO to be executed by the supplier of the commodity.

(b) Cost of ocean freight. The cost of ocean freight to be executed by the ocean carrier.

(c) Cost of marine insurance. The cost of marine insurance to be executed by the insurer, insurance broker, or underwriter.

(ii) Special provision in case of direct reimbursement to cooperating country. In the case of financing by reimbursement directly to a cooperating country for payments made by it for procurement (this does not include financing by letters of commitment to banking institutions in the United States or letters of commitment to suppliers), the supplier may, if he desires, submit, and ICA will accept, in lieu of the certificate and abstract described in subdivision (i) of this subparagraph, a supplier's certificate in duplicate, with invoice-and-contract abstract completed in all applicable respects except as to class of supplier, information as to agents' commissions, domestic and foreign, and domestic unit price information, accompanied by a sealed envelope, addressed to the Controller, ICA, Washington, D. C., with the following statement upon its face, signed by the supplier:

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The undersigned certifies that enclosed in this envelope is a copy of an executed Supplier's Certificate (Form ICA-280) covering the item invoiced, which has been filled in wherever applicable. This envelope contains a document intended only for ICA and is to be opened only by ICA.

If such alternative procedure is used, the signer of the supplier's certificate shall be deemed to have satisfied the requirement in paragraph (10) of the supplier's certificate (paragraph (D) of this section) that he has filled in the applicable portions of the invoice-and-contract abstract.

(3) Evidence of shipment—

(i) Bill of lading or substitute. One copy (or photostat) of ocean or charter party bill of lading, or airway bill, or parcel post receipt.

(ii) Tanker shipments. In the case of tanker shipments only, one copy (or photostat) of cablegram from ship's agent showing loaded cargo figures and a certificate by the supplier that the bill of lading is not immediately available, and that a copy (or photostat) of the bill of lading will be submitted by the supplier to the Controller, ICA, Washington, D. C., within 120 days from the date of loading.

(iii) Bank certificate for shipments from United States. In the case of any commodity shipped from the continental United States (excluding Alaska) and financed under a letter of commitment to a banking institution in the United States, ICA will accept in lieu of the documents referred to in subdivisions (i) and (ii) of this subparagraph, a certificate from the banking institution to the effect that it has been informed by the approved applicant or supplier that the sale is on an f. o. b. or f. a. s. basis and it is impracticable to furnish an ocean or charter party bill of lading, airway bill or parcel post receipt, and that either:

(a) Shipment document sent by bank. The banking institution has received a common carrier bill of lading, warehouse receipt, mate's receipt, master's receipt, dock receipt or domestic parcel post receipt (if in non-negotiable form, showing that the commodity has been consigned to or is being held for a person or organization designated by the approved applicant); it has delivered or sent the same, in accordance with the instructions of the approved applicant, to a person or organization designated by the approved applicant; and it has in its possession a written undertaking of such person or organization (1) to arrange for ocean shipment and to deliver to the banking institution a copy (or photostat) of the ocean or charter party bill of lading, airway bill, or parcel post receipt for forwarding to ICA, or (2) if unable to arrange for ocean shipments within 90 days of the date of the undertaking, to so notify the Controller, ICA, Washington, D. C., and at such time as ICA may request, to deliver to the banking institution for forwarding to ICA, a common carrier bill of lading or warehouse receipt in negotiable form for the commodity; or

(b) Shipment document held by bank. The banking institution has received a common carrier bill of lading or warehouse receipt in negotiable form, and is in possession of the same; it has been unable to deliver the same to a person or organization designated by the approved applicant against the written undertaking described in (A) of this subdivision; and it is holding the negotiable common carrier bill of lading or negotiable warehouse receipt subject to the instructions of ICA, and will forward same to ICA when and if so instructed; except that if it becomes possible before any such instructions are received, it will proceed in accordance with (a) of this subdivision.

(iv) Bank certificate for shipments from outside United States. In the case of shipments, other than by ocean vessel or aircraft, to a cooperating country from an authorized source country or area other than the continental United States but including Alaska, if the banking institution furnishes a certificate to the effect that it has been informed by the approved applicant or the supplier that it is impracticable to furnish any of the documents described in subdivision (i) of this subparagraph, such other documents evidencing shipment to or receipt by the cooperating country as are acceptable under good commercial practice, such as railway, barge, or truck bills of lading, or importers' receipts.

(4) Supplier's invoice. One copy (or photostat) of supplier's detailed invoice showing quantity, description, gross sales price, net sales price (after deducting all discounts and purchasing agents' commissions applicable) and basis of delivery (e. g., f. o. b. vessel, f. a. s.) of the commodities

or services, and either (i) marked "Paid" by the supplier or (ii) endorsed by, or accompanied by a certificate of, an officer of a banking institution indicating that payment has been made in the amount shown on the invoice. In the case of commodities shipped from a free port or bonded warehouse, a statement by the supplier shall be endorsed on, or attached to, the copy (or photostat) of the supplier's invoice indicating (a) shipment from either a free port or bonded warehouse, in accordance with the facts, and (b) the country or area from which the commodity was shipped into such free port or bonded warehouse.

(5) Additional or substitute documents. Such additional or substitute documentation as may be required for reimbursement by endorsement upon the PA or PIO or letter of commitment, if any.

(B) For cost of ocean freight. For cost of ocean transportation, including ocean freight paid by the supplier of the commodity under instructions to pay the same under an ocean transportation PA:

(1) Voucher SF-1146. Voucher SF-1146 in original and three copies to be prepared by the cooperating country, by the approved applicant, or by the banking institution as assignee, or as agent for and in behalf of the approved applicant.

(2) Supplier's certificate. Supplier's certificate, in triplicate, with invoice-and-contract abstract on reverse side (Form ICA-280, set out in paragraph (D) of this section) to be executed by the supplier of the ocean transportation. If the supplier of ocean transportation is not the carrier, an additional supplier's certificate, in triplicate, with invoice-and-contract abstract on reverse side, executed by the carrier, covering the cost of ocean freight.

(3) Charter party or contract of affreightment. For cargoes shipped under charter party, one copy (or photostat) of charter party. In the case of tanker shipments only, if shipment is not made under charter party, one copy (or photostat) of the contract of affreightment. In the case of a term charter party or term contract of affreightment, ICA will accept, in lieu of either of the above, a certificate by the supplier of the ocean transportation, to the effect that a copy (or photostat) of the charter party or contract of affreightment has previously been submitted to ICA in support of a request for reimbursement.

(4) Bill of lading or other evidence of shipment. One copy (or photostat) of ocean or charter party bill of lading or airway bill. In the case of tanker shipments only, one copy (or photostat) of cablegram from ship's agent showing loaded cargo figures, and a certificate by the supplier of the ocean transportation that the bill of lading is not immediately available, and that a copy (or photostat) of the bill of lading will be submitted by the supplier of the ocean transportation to the Controller, ICA, Washington, D. C., within 120 days from date of loading.

(5) Supplier's invoice. One copy (or photostat) of the detailed invoice of the supplier of the ocean transportation indicating the vessel, flag and the dollar and/or local currency cost of ocean freight and related transportation charges, and either (i) marked "Paid" by the supplier of the ocean transportation or (ii) endorsed by, or accompanied by a certificate of, an officer of a banking institution indicating that payment has been made in the amount shown on the invoice. If the bill of lading (required by subparagraph (4) of this paragraph) meets the requirements of this subparagraph no invoice is required.

(6) Additional or substitute documents. Such additional or substitute documentation as may be required for reimbursement by endorsement upon the PA, PIO, or letter of commitment, if any.

(C) For cost of services. For the cost of services (other than ocean transportation and marine insurance):

(1) Voucher SF-1146. Voucher SF-1146, in original and three copies, to be prepared by the supplier or his assignee where letter of commitment is issued by ICA to the supplier; or, in other cases, by the cooperating country by the approved applicant, or by the banking institution as assignee, or as agent for and in behalf of the approved applicant.

(2) Supplier's certificate. Supplier's certificate, in triplicate, with invoice-and-contract abstract on reverse side (Form ICA-280, set out in paragraph (D) of this section), covering the total amount for which reimbursement is requested, to be executed by the supplier.

(3) Supplier's invoice and works progress certificate. One copy (or photostat) of supplier's detailed invoice describing the services performed, itemizing in detail all dollar and/or local currency costs reimbursable by ICA (showing separately costs of travel, material and equipment, if any) and fees

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earned and payable, and either (i) marked "Paid" by the supplier, or (ii) endorsed by, or accompanied by a certificate of an officer of a banking institution indicating that payment has been made in the amount shown on the invoice. The invoice shall also indicate: (*a*) The total estimated dollar and/or local currency cost of services and fees under the contract and reimbursable by ICA; (*b*) the total amount previously received and/or claimed from ICA as partial payments, detailed by amounts and dates; (*c*) the amount invoiced; (*d*) total estimated cost of services and fees not yet invoiced and reimbursable by ICA. In addition, attached to or endorsed on the invoice, shall be one copy of a Works Progress Certificate signed by the supplier in the following form:

The undersigned certifies that the cost of services reimbursable to the supplier and the amount of fee earned by the supplier up to the date of this certificate are not less than the total payments received or claimed by the supplier under the contract (including the payment claimed under the invoice), and that the supplier has fully complied with the terms and conditions of the contract.

(4) Documents where service supplier reimbursement includes travel, material, or equipment costs. In the event that the dollar and/or local currency cost of services reimbursable by ICA to the supplier includes travel or material or equipment costs:

(i) Vendors' invoices. Receipted vendors' invoices, appropriately detailed as to quantity, description and price; provided that, in respect of individual transactions involving less than $50 each, the supplier may furnish, in lieu of such receipted invoices, a detailed itemization of the vendors' invoices with payment indicated by the supplier's check numbers or other certification.

(ii) Bill of lading or other evidence of shipment. In the case of material or equipment costs only, one copy (or photostat) of the ocean bill of lading, airway bill, parcel post receipt or a certificate by the supplier as follows:

It is impracticable to furnish to ICA an ocean bill of lading, airway bill or parcel post receipt as evidence of delivery of—(material or equipment)—which has been delivered to the undersigned for use in performing services under the contract. Covering vouchers in the files of the undersigned are available for inspection.

(5) Certificate of performance. Certificate by an authorized representative of the cooperating country as follows:

The undersigned certifies that (i) the services for which reimbursement is requested have been satisfactorily rendered; (ii) the costs thereof are properly reimbursable, and the fees earned, in accordance with the terms of the contract; and (iii) any reports or recommendations required under the terms of the contract have been received.

(6) Additional or substitute documents. Such additional or substitute documentation as may be required for reimbursement by endorsement upon the PA, PIO or letter of commitment, if any.

(D) Supplier's certificate and invoice-and-contract abstract—

(1) Form of supplier's certificate. The supplier shall in all cases execute the supplier's certificate (Form ICA-280) referred to in paragraphs (A) (2), (B) (2) and (C) (2) of this section, which certificate is as follows:

Form 280 (10/55 Revised)
International Cooperation Administration

SUPPLIER'S CERTIFICATE

ICA Proc. Auth. or Project
Implementation Order No. .....

The supplier hereby acknowledges notice that the sum indicated on the accompanying invoice, as claimed to be due and owing under the terms of the underlying contract, is to be paid out of funds made available by the United States under the Mutual Security Act, as in effect on the date hereof, and subject to ICA Regulation 1, as amended, and further certifies and agrees with the Director of the International Cooperation Administration as follows:

(1) The supplier is entitled under said contract to the payment of the sum claimed, and he will promptly make appropriate refund to ICA upon request of the Director, in the event of his nonperformance, in whole or in part, under said contract, or for any breach by him of the terms of this certificate.

(2) Adjustment refunds or credits arising out of the terms of the contract or the customs of the trade shall be made direct to the buyer, but the supplier will promptly notify the Director concerning any such adjustment refunds or credits, so that the Director may obtain appropriate refund from the cooperating country. If an adjustment results in an additional charge to the purchaser, the supplier will promptly notify the Director of such additional charge.

(3) If the said contract is on a c. & f. (cost and freight) or c. i. f. (cost, insurance, and freight) basis,

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the supplier is entitled to payment, under ICA Regulation 1, as amended, of any ocean freight charges included in the sum claimed. The supplier is entitled to payment, under ICA Regulation 1, as amended, of any ocean marine insurance premium charges included in the sum claimed.

(4) The supplier is the producer, manufacturer, processor, or exporter of, or a regular dealer in the commodity, or furnishes the service covered by said contract and has not employed any person to obtain said contract under any agreement for a commission, percentage, or contingent fee, except to the extent, if any, of the payment of a commission to a bona fide established commercial or selling agent employed by the supplier as disclosed on the reverse of this form.

(5) The supplier has not given or received and will not give or receive by way of side payments, "kick-backs" or otherwise, any benefit in connection with said contract except as is disclosed on the reverse of this form, or as is the result of the adjustments referred to in Paragraph 2.

(6) If the supplier is the producer, manufacturer or processor of a commodity, said contract is not a cost-plus-a-percentage-of-cost contract.

(7) The supplier further certifies, on the basis of information obtained from such sources as are available to him, that to the best of his information and belief the purchase price is no higher than the market price (which shall mean the export market price, where such a price is customary in the trade) prevailing in the United States at the time of purchase, adjusted for differences in the cost of transportation to destination, quality, and terms of payment.

(8) The supplier further certifies that (a) on the basis of information obtained from such sources as are available to him, and to the best of his information and belief, the purchase price is no higher than the price calculated in accordance with the applicable price provisions of ICA Regulation 1, as amended, and he has complied with the rules provided therein; and (b) he has allowed all discounts, including discounts for quantity purchases and prompt payment, customarily allowed his other customers similarly situated.

(9) If the supplier furnishes only a service, he shall not be deemed to certify to paragraphs 7 and 8 but instead certifies that the rate indicated on the reverse of this form for the service rendered does not exceed the prevailing rate, if any, for similar services or the rate paid to the supplier for similar services by other customers similarly situated.

(10) The supplier has filled in the applicable portions of the invoice-and-contract abstract on the reverse hereof, certifies to the correctness of the information shown therein, and will furnish promptly to the Director at his request such additional information in such form as the Director may require concerning price or any other details of the purchase.

Date .....

Place executed (City, State, Country) .....

.....
(Authorized signature)

.....
(Title)

NOTES: (a) Any amendments, deletions of applicable provisions, or substitutions will invalidate this certificate.
(b) False statements herein are punishable by United States law.
(c) The word "Duplicate" must be written after signature on all signed copies other than the original.

(2) Execution of supplier's certificate. Before executing the supplier's certificate, the supplier shall fill in the invoice-and-contract abstract on the reverse side in accordance with the instructions attached to the form. The certificate shall be signed by a responsible official of the supplier, indicating capacity in which signed. Normally, only the original of the supplier's certificate should be signed; if for any reason, copies other than the original need to be signed, they should be clearly marked "Duplicate" after the signature.

(3) Contents of abstract. The information required by the abstract is generally as follows:

(1) Invoice information, including the supplier's name and address, the importer's name and address, and detailed billing and shipping data.

(2) Information relating to agents' commissions payable.

(3) Contract and price information including a reconciliation of the contract, invoice and domestic unit prices applicable.

§ 201.19 Procurement by United States Government Agencies. When procurement of a commodity or service is made through United States Government procurement facilities in accordance with § 201.9, arrangements will be made for the reimbursement of the procuring department, agency or establishment by ICA.

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SUBPART D—PRICE PROVISIONS

§ 201.20 Purchase in Bulk of Commodities—

(A) Adjusted market price. The term "adjusted market price" means the market price prevailing in the United States at the time of the purchase, adjusted for differences in the cost of transportation to destination, quality, and terms of payment, as determined by the Director.

(B) Scope. This section establishes the procedures for compliance with section 510 of the act, which section applies to all purchases in bulk.

(C) Determination of adjusted market price. Determination of the adjusted market price may be made by the Director in such manner as to reflect commonly accepted trade practices. In the case of purchases in bulk made outside the United States, the Director may determine that the purchase price complies with said section 510 of the act, if he determines that such price, plus cost of transportation and related charges at established rates from place of purchase to the cooperating country, does not exceed the market price prevailing in the United States (adjusted for differences in quality and terms of payment), plus cost of transportation and related charges at established rates to the cooperating country. If the price of any purchase in bulk exceeds the adjusted market price, the cooperating country shall pay promptly to the Director upon demand the entire amount of the purchase price.

§ 201.21 Purchase Prices—

(A) Scope of this section—

(1) Price limitations—

(i) Criteria. Section 510 of the act establishes an upper limit to the prices that may be approved by ICA for purchases in bulk of commodities (see § 201.20). Within that limitation, it is the policy of ICA to make payment for purchases of commodities, whether or not in bulk, which are made at prices that approximate, as nearly as practicable, lowest competitive market prices. It is expected that buyers, making adequate solicitation of suppliers from authorized sources and exercising prudence in their negotiations, will agree to pay no more than such prices.

(ii) Compliance. The rules set forth in this section are intended as a guide to buyers and sellers in conducting their negotiations. The rules in this part fix the point beyond which purchases will not be eligible for reimbursement by ICA. Compliance with them will make a purchase eligible for financing, and post-audit will be made by ICA to determine whether there has been compliance. If, apart from the rules set forth herein, it appears that the objective of lowest competitive market prices is not being met, ICA will take appropriate action to impose additional limitations, and may, in cases where failure to follow this policy is deemed unreasonable by the Director, require from the cooperating country a refund of the entire amount reimbursed.

(2) Applicability of section. The provisions of this section shall apply to all purchases.

(B) Meaning of terms in this section—

(1) Similar commodity. One commodity shall be deemed similar to another commodity if both have the same use, afford the purchaser equivalent serviceability, and belong to a type which would ordinarily be sold in the same price line.

(2) Comparable sale—

(i) In general. The term "comparable sale" includes all sales which are comparable as to quantity, quality, grade, period of delivery, supply area, terms of sale and class of customer.

(ii) Under special market conditions. If special market conditions exist in a country other than the United States, a sale for export to such country shall not necessarily be deemed to be comparable to a sale for export to any other country.

(3) Competitive sellers. "Competitive sellers" means sellers of the same class (manufacturers, merchant exporters, etc.) who are selling the same or similar commodities from the same supply area.

(4) Manufacturers, producers or processors. "Manufacturers, producers or processors" means sellers who operate a factory, mill, assembly plant, well, mine or similar facility in which, by mechanical or chemical apparatus or other similar means, raw materials or ingredients are processed, component parts assembled or manipulated, in the preparation of the product for sale. A seller shall not be deemed to

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be a manufacturer, producer or processor in an export sale which involves a commodity which he did not manufacture, produce or process.

(5) Export differential. "Export differential" means the difference between a domestic sale price and an export sale price computed either as a percentage of the domestic price or in accordance with any other established practice of the seller.

(6) Time of purchase. "Time of purchase" means the date of the purchase contract unless the contract fixes the price as of the delivery date or postpones the date of delivery longer than is customary in the trade for such contracts in which cases "time of purchase" means the date of delivery.

(C) Comparison of prices—

(1) When to use same or similar commodity. Wherever, in this section, the term "same or a similar commodity" is used, comparison, where possible, shall be made with reference to the same commodity. Where such comparison is not possible, comparison shall then be made with a reference to a similar commodity.

(2) Adjustment of domestic price. Wherever, in this section, a comparison with a domestic sales price is required and such domestic price is on a different delivered basis than the export sales price as, for example, where the domestic price is on an f. o. b. plant basis and the export price is on an f. a. s. basis, addition of inland transportation costs and other related and necessary inland costs to the domestic price may be made in order to afford a proper comparison with the export sales price.

(D) Prices for purchases in the United States—

(1) Class I; certain listed commodities—

(i) Transactions included. Transactions in Class I shall include all purchases in the United States of any of the following listed commodities:

Silk, raw.
Wool, raw.
Soft hemp.
Flax fiber
Ramie fiber.
Abaca or manila fiber.
Rye.
Coir or cocos fiber.
Animal hairs other than wool.
Corn
Oats.
Barley.
Grain sorghum.
Buckwheat.
Rye flour.
Wheat flour.
Corn flour.
Corn grits.
Cornmeal.
Rolled oats.
Soy flour.
Rice.
Babassu kernels or nuts.
Castor beans.
Castor oil.
Cocoa butter.
Cottonseed oil.
Coconut oil.
Copra.
Corn byproducts feeds.
Milk byproducts feeds.
Grease, inedible.
Lanolin.
Lard.
Linseed oil.
Mustard seed.
Mustard seed oil.
Cotton, raw.
Cotton, linters.
Cotton waste.
Fatty acids; animal, vegetable or marine origin.
Fish oils.
Flaxseed.
Wheat.
Soap.
Soybeans.
Soybean oil.
Sperm oil.
Sunflower seed.
Sunflower seed oil.
Tallow.
Tung oil.
Whale oil.
Cottonseed cake or meal.
Soybean cake or meal.
Sesame seed oil.
Sisal or henequen fiber
Istle or tula fiber.
Couch grass or broom root fiber.
Jute fiber.
Linseed cake or meal.
Peanut cake or meal.
Other oilseed cakes and meals.
Wheat mill feeds.
Mixed animal and poultry feeds.
Fish scrap and meal.
Rapeseed oil.
Sesame seed.
Meat byproducts feeds.
Brewers and distillers byproducts feeds.
Turpentine.
Natural resins.
Tall oil, crude and refined.
Beans, dry edible.

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Neat's foot oil.	Cocoa beans.
Olive oil.	Coffee, green.
Palm oil.	Fruit, dried.
Palm kernels.	Fruit, fresh.
Palm kernel oil.	Peas, dry edible.
Peanuts.	Sugar, raw.
Peanut oil.	Sugar, refined.
Rapeseed.	

(ii) Price limitation. The price (not including ocean freight or ocean marine insurance) for a Class I purchase shall not exceed the price prevailing in the United States in comparable sales of the commodity, at the time of the purchase, as evidenced by current bid and ask quotations in the appropriate market, adjusted by costs customarily and necessarily incurred in making the export sale.

(2) Class II; purchases of unlisted commodities from manufacturers, producers or processors (primary sellers)—

(i) Transactions included. Transactions in Class II shall include all purchases in the United States from a manufacturer, producer, or processor of any commodity except commodities listed in Class I, or subject to special rules under Class IV below.

(ii) Price limitation. The price (not including ocean freight or ocean marine insurance) for a Class II purchase shall in no case exceed any price charged by the supplier at the time of purchase in a comparable export sale of the same or a similar commodity. Nor shall it exceed the sum of the applicable figures determined under (a) and (b) of this subdivision.

(a) Domestic price base—

(1) Supplier's comparable sales. The price charged by the supplier in comparable domestic sales of the same or a similar commodity made during the period in which the supplier's current domestic prices have been in effect. If, during that period, more than one price was charged in such sales, the figure under this subdivision shall be the price charged in the comparable domestic sale made nearest, in point of time, to the purchase being submitted for ICA reimbursement.

(2) Supplier's non-comparable sales. If the supplier made domestic sales of the same or a similar commodity during the aforementioned period, but such sales were not comparable, the figure under this subdivision shall be the price charged in the domestic sale made nearest, in point of time, to the purchase being submitted for ICA reimbursement, adjusted by the supplier's customary differential between such sales and the sale involved in the ICA transaction.

(3) Competitor's comparable sales. If the supplier made no domestic sales of the same or a similar commodity during the aforementioned period, the figure under this subdivision shall be the price prevailing in the United States at the time of purchase, in comparable domestic sales of the same or similar commodity by the supplier's competitive sellers.

(b) Export differential—

(1) Supplier's comparable sales. An export differential, if any, customarily used by the supplier in comparable sales of the same or a similar commodity or currently being used by the supplier in comparable non-ICA sales of the same or a similar commodity.

(2) Competitor's comparable sales. If the supplier has not previously made any export sales of the same or a similar commodity, the figure under this subdivision shall be an export differential which would be recognized for reimbursement by ICA, in comparable sales, at the time of purchase of the same or a similar commodity by any of the supplier's competitive sellers.

(iii) Non-recognition of excessive export differential. With respect to Class II transactions, ICA may refuse to recognize for reimbursement any purchase price which includes an export differential that is patently out of line with appropriate export differentials of the supplier's competitive sellers.

(3) Class III; purchases of unlisted commodities from sellers (secondary sellers) other than manufacturers, producers or processors—

(i) Transactions included. Transactions in Class III shall include all purchases within the United States from a seller other than a manufacturer, producer, or processor of any commodity except commodities listed in Class I or subject to special rules under Class IV below.

[165] (ii) **Price limitation.** The price (not including ocean freight or ocean marine insurance) for a Class III purchase shall in no case exceed any price charged by the supplier at the time of purchase in a comparable export sale of the same or a simliar commodity except to the extent necessary to reflect a difference in his acquisition cost of the commodity. Nor shall it exceed the sum of the applicable figures determined under (a) and (b) of this subdivision:

(a) **Domestic price base—**

(1) **Domestic price of manufacturer, producer or processor.** The domestic price of the manufacturer, producer or processor of the commodity, in effect at the time of the purchase by the importer.

(2) **Domestic price of other manufacturers, producers or processors.** If the supplier is unable to ascertain the domestic price of the manufacturer, producer or processor of the commodity, the figure under this subdivision shall be the domestic price of manufacturers, producers or processors of the same or a similar commodity, prevailing at the time of purchase by the importer.

(3) **Supplier's cost of of acquisition.** If the same or a similar commodity is not sold in the domestic market, the figure under this subdivision shall be the supplier's cost of acquisition.

(b) **Export differential—**

(1) **Supplier's comparable sales.** An export differential, if any, customarily used by the suppplier in comparable sales of the same or a similar commodity or currently being used by the supplier in comparable non-ICA sales of the same or a similar commodity.

(2) **Competitor's comparable sales.** If the supplier has not previously made any export sales of the same or a similar commodity the figure under this subdivision shall be an export differential which would be recognized for reimbursement by ICA, in comparable sales at the time of purchase of the same or similar commodity by any of the supplier's competitive sellers.

(iii) **Non-recognition of excessive export differential.** With respect to Class III transactions, ICA may refuse to recognize for reimbursement any purchase price which includes an export differential that is patently out of line with appropriate export differentials of the supplier's competitive sellers.

(4) **Class IV; special rules for certain commodities.** Special rules for certain commodities may be established from time to time by the Director.

(i) **Petroleum products—**

(a) **Purchases from any source.** Purchases from any source: A price for a purchase of a petroleum product from any source will not be approved for reimbursement if it results in a delivered cost to the cooperating country which is in excess of the lowest prevailing delivered cost on the date the purchase price is fixed for a comparable export sale of the same or similar commodity to such cooperating country from any alternative source of supply from which the commodity is available for export in sufficient quantity.

(b) **Purchases from non-United States sources.** Purchases from sources other than the United States: A price for a purchase of a petroleum product from sources other than the United States will be approved for reimbursement if it complies with the requirements of § 201.20 and of paragraph (E) (2) of this section, and, unless from a supply area excepted by ICA, does not exceed the lowest competitive market price in the United States for a comparable export sale of the same or a similar commodity on the date the purchase price is fixed.

(c) **Special meaning of price.** For purposes of this subdivision "price" shall mean the realized f. o. b. price or realized netback.

(E) **Prices for purchases outside the United States—**

(1) **Commodities listed in Class I in paragraph (D) (1) of this section—**

(i) **Price limitation—**

(a) **United States export price.** The price plus cost of transportation to the port of entry in the cooperating country for a purchase outside the United States of a commodity listed in Class I in paragraph (D) (1) of this section shall not exceed the price prevailing in the United

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States in comparable sales of the commodity at the time of purchase, as evidenced by current bid and ask quotations, adjusted by costs customarily and necessarily incurred in making the export sale, plus cost of transportation to the port of entry in the cooperating country.

(b) Source country export price. Nor shall the price exceed the prevailing export market price at the time of purchase in comparable sales of the commodity from the source country.

(ii) Additional price limit for sugar. In addition, in the case of sugar, the purchase price shall not exceed the world price as derived from the daily market quotation on World Raws, No. 4 Contract, F. A. S. Cuban Ports, adjusted for differences in quality, bagging, cost of transportation to destination, and other appropriate considerations.

(2) Unlisted commodities—

(i) Price limitation. A price for a purchase outside the United States of a commodity which is not listed in Class I in paragraph (D) (1) of this section or subject to special rules under Class IV in paragraph (D) (4) of this section will be approved for reimbursement if:

(ii) Supplier's comparable export sale. It does not exceed any price charged by the supplier at the time of purchase in a comparable export sale of the same or a similar commodity; and

(iii) Source country principal supplier's export sale. It does not exceed the export market price prevailing at the time of purchase in comparable sales of the same or a similar commodity by the "principal suppliers" in the source country, determined by applying to that country as nearly as may be, the rules set forth in paragraph (D) (2) or (3) of this section as applicable; and

(iv) United States principal supplier's export sale. It results in a delivered cost to the port of entry in the cooperating country no higher than the delivered cost which would have been incurred in a purchase for export of the same or a similar commodity from one of the "principal suppliers" in the United States.

(v) Meaning of principal supplier. For the purposes of this subparagraph, a supplier shall be deemed a "principal supplier" if he is one of the group of the largest volume sellers responsible for 50 percent of the export sales of the commodity from the United States, or source country, whichever is applicable.

SUBPART E—RESPONSIBILITIES OF BANKING INSTITUTIONS

§ 201.22 Responsibilities of Banking Institutions in Connection With Letters of Commitment issued to Them—

(A) Documents required for reimbursement. Documents required for reimbursement are enumerated in § 201.18. Any additional documents required for reimbursement with respect to any particular transaction will be specified as such in the PA or PIO related to that transaction and to the corresponding letter of commitment, or in the letter of commitment itself. A banking institution in the United States (called "bank" in this subpart) holding a letter of commitment is not required by ICA to obtain any documents other than those enumerated in § 201.18 and any additional documents so specified.

(B) Non-responsibility of bank for contents of documents. A bank is not responsible for the truth or accuracy of the statements contained in any of the documents required for reimbursement. A bank is not obliged to look beyond these documents nor to make independent investigation as to the accuracy of statements made therein. A bank has no responsibility for the terms or conditions of any project agreement.

(C) Responsibility of bank for examination of documents—

(1) Nature of responsibility. A bank's examination of the documents required for reimbursement[2] must be made in accordance with good commercial practice. A bank is responsible to

[2] In paragraphs (C), (E), (F), (G), and (H) of this section, the phrase "documents required for reimbursement" does not include the invoice-and-contract abstract, as to which, see § 201.16 (C) (2) (ii).

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see that the documents required for reimbursement are consistent with the relative PA or PIO and letter of commitment in the following particulars, and no other:

(i) Delivery, to the extent described in paragraph (D) of this section;

(ii) Source, to the extent described in paragraph (E) of this section;

(iii) Destination, to the extent described in paragraph (F) of this section;

(iv) Description, to the extent described in paragraph (G) of this section;

(v) Discounts and purchasing agents' commissions, to the extent described in paragraph (H) of this section;

(vi) If the bank is to be responsible for any additional particulars, these will be specified in the PA, PIO or letter of commitment as additional documents required for reimbursement, or as additional statements to be contained in the documents required for reimbursement.

(2) **Limitation on responsibility.** The right of reimbursement for payments made by a bank in accordance with good commercial practice will not be affected by the information contained in the invoice-and-contract abstract, nor, except with respect to those particulars listed in subdivisions (i) through (vi) of subparagraph (1) of this paragraph, by the fact that the other documents received by the bank, or information or notice received from any source, indicate noncompliance with any provision of this part, or of the PA, PIO or of the letter of commitment.

(3) **Reservation of rights by ICA against supplier and cooperating country.** The foregoing shall not be construed to limit any rights the Director may have against a supplier by reason of statements contained in the supplier's certificate, nor against a cooperating country under § 201.6 (D).

(D) **Delivery.** Section 201.5 (A) (3) and (C) (1) permit delivery under a PA or PIO at any time on or after the initial delivery date and on or before the terminal delivery date specified on the PA or PIO. If any of the documents specified in § 201.18 (A) (3), (B) (4), or (C) (3) (or in the PA, PIO, or letter of commitment) are dated at any time within the period during which delivery is permissible under the above subsections, or any other period permitted by ICA they are acceptable.

(E) **Source.** If the documents required for reimbursement show shipment from or storage in the area shown as "source" in the PA or PIO, they are acceptable unless a statement furnished under § 201.18 (A) (4) indicates that the "source" is not the one shown in the PA or PIO. If such documents show shipment from or storage in another area, the requirement as to source will be satisfied if the bank receives a certificate from the supplier, indicating that the area of "source" as that term is defined in § 201.1 (M), is in fact the same as that indicated in the PA or PIO.

(F) **Destination.** The PA or PIO will show the recipient country. If the documents required for reimbursement are consistent, under good commercial practice, with shipment or transshipment to such country, they are acceptable.

(G) **Description.** The PA or PIO will show the commodity or services by description and ICA commodity code number. In issuing or confirming credits, a bank should see that the commodities or services described are not inconsistent with the ICA description and commodity code number. In making payment, whether under letters of credit or otherwise, the bank should act in accordance with good commercial practice, based on the description contained in the documents required for reimbursement, and without regard to the commodity code number.

(H) **Discounts and purchasing agents' commissions.** A bank is not required to make independent inquiry as to whether an invoice price includes either discounts or commissions payable to purchasing agents, but should not make payment of any such items when disclosed by the documents required for reimbursement.

(I) **General provisions of PA's and PIO's—**

(1) **Reliance by bank on supplier's certificate.** Section 201.6 sets forth certain provisions to be deemed incorporated in each PA or PIO, unless otherwise specified. The documents required for reimbursement by § 201.18 include a supplier's certificate showing compliance with some of these provisions. A bank is entitled to rely on such certificate. Special certificates may also be re-

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quired by the terms of particular PA's or PIO's or letters of commitment; in such cases, a bank is entitled to rely on such certificates.

(2) Provisions beyond bank responsibility. Certain other provisions of § 201.6 are included solely for the instruction of suppliers, purchasers, and the cooperating countries themselves, and are not matters for which banks are to assume responsibility. In this category are the provisions of § 201.6 (F) (2), (G), (H), (I), (J), (K), (L) and (M).

(J) Ocean transportation. A bank which obtains a supplier's certificate is not required to assume responsibility for compliance with § 201.7, regardless of whether other documentation or information received indicates compliance or non-compliance with such section.

(K) Contracting and reporting under PA's and PIO's. Banks financing transactions under letters of commitment or PA's or PIO's are not required to assume responsibility for compliance with the provisions of § 201.5 (A) (1) and (2).

(L) Responsibility of importers and suppliers. Subpart B of this part (§§ 201.10 to 201.13) contains provisions concerning use of the PA or PIO number, placement of orders and delivery dates, markings of commodities, and notice to the ICA Office of Small Business. Banks financing transactions under letters of commitment or PA's or PIO's are not required to assume responsibility for compliance with this subpart.

(M) Bank letter of commitment; expiration in letter of credit transactions. The letter of commitment constitutes an obligation to reimburse for any drafts or documents negotiated under letters of credit prior to the date of maturity specified in the letter of commitment, even though such drafts or documents are paid after such date.

(N) Bank letter of commitment; payment to third persons. The right of reimbursement for a payment made by a bank under a letter of commitment will not be affected by the fact that such payment is made to the approved applicant named in the letter of commitment, or, at the request of the approved applicant, to a person other than the supplier, provided the bank has complied with the other requirements of the letter of commitment and has satisfied itself in good faith that the person to whom it makes payment has made payment to the supplier.

(O) Bank unable to deliver or send non-negotiable document to forwarding agent under § 201.18 (A) (3). The right of reimbursement for payment made by a bank under a letter of commitment will not be affected by the fact that the bank is unable to deliver or send a non-negotiable shipping document or receipt to the designated person as contemplated by § 201.18 (A) (3) (iii) (*a*), if the bank is prevented from doing so because of any action by the United States Government or other causes beyond its control. In such case, the bank's certificate may be altered accordingly, and may state that the bank does not have a written undertaking from the designated person, but the certificate may not be altered in any other way, and the bank will continue to hold the document involved subject to the instructions of ICA, except that if it becomes possible before any such instructions are received, the bank will deliver or send such document to the designated person.

SUBPART F—WAIVER AUTHORITY AND TRANSITORY PROVISIONS

§ 201.23 Waiver and Amendment Authority. The Director may waive, withdraw, or amend at any time, or from time to time, any or all of the provisions of this part.

§ 201.24 Continuation in Effect of Certain Prior Issuances. Cooperating country allotments, PA's or PIO's, U. S. Government agency purchase requisitions, letters of commitment to banking institutions and letters of commitment to suppliers, issued by ECA under ECA Regulation 1, as amended, and by MSA under MSA Regulation 1 as amended, and by FOA under FOA Regulation 1, as amended, are reaffirmed and will continue in effect, subject to the terms and conditions thereof. The provisions of this part may be satisfied by the submission of a certificate or writing in a form: (a) Prescribed by or provided for by corresponding provisions of ECA Regulation 1, as in effect on December 29, 1951, or authorized by ECA on that date, or referring to an ECA Commodity Code number; or (b) prescribed by or provided for by corresponding provisions of MSA Regulation 1, as in effect on July 31, 1953, or

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authorized by MSA on that date, or referring to an MSA Commodity Code number; (c) or prescribed by or provided for by corresponding provisions of FOA Regulation 1, as in effect on June 30, 1955, or authorized by FOA on that date, or referring to an FOA Commodity Code number; or (d) prescribed by or provided for by corresponding provisions of ICA Regulation 1, as in effect on October 24, 1955, or authorized by ICA on that date, or referring to an ICA Commodity Code number. Authorizations, bank contracts, letters of guaranty to banking institutions or suppliers issued by The Institute of Inter-American Affairs, the Technical Cooperation Administration, the Foreign Operations Administration, and the International Cooperation Administration, all prior to October 25, 1955, are reaffirmed and will continue in effect subject to the terms and conditions thereof. Amendments to any of the above documents may continue to be made in accordance with the procedures in effect prior to October 25, 1955.

§ 201.25 Transitory Provision. This revision of Part 201 shall become effective as of November 11, 1957. However, none of the amendments to Part 201 made effective by this revision will be applicable to claims for reimbursement from, or payments made to, a supplier pursuant to letters of credit issued, confirmed, or advised, or payment instructions received prior to November 11, 1957.

J. H. Smith, Jr.
Director
International Cooperation Administration
Oct. 22, 1957 [F. R. Doc. 57-8827]

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SUPPLIER'S CERTIFICATE

The supplier hereby acknowledges notice that the sum indicated on the accompanying invoice as claimed to be due and owing under the terms of the underlying contract is to be paid out of funds made available by the United States under the Mutual Security Act, as in effect on the date hereof, and subject to ICA Regulation 1, as amended, and further certifies and agrees with the Director of the International Cooperation Administration (ICA) as follows:

(1) The supplier is entitled under said contract to the payment of the sum claimed and he will promptly make appropriate refund to ICA upon request of the Director in the event of his non-performance, in whole or in part, under said contract, or for any breach by him of the terms of this certificate.

(2) Adjustment refunds or credits arising out of the terms of the contract or the customs of the trade shall be made direct to the buyer, but the supplier will promptly notify the Director concerning any such adjustment refunds or credits, so that the Director may obtain appropriate refund from the cooperating country. If an adjustment results in an additional charge to the purchaser, the supplier will promptly notify the Director of such additional charge.

(3) If the said contract is on a C&F (cost and freight) or a CIF (cost, insurance and freight) basis, the supplier is entitled to payment, under ICA Regulation 1, as amended, of any ocean freight charges included in the sum claimed. The Supplier is entitled to payment, under ICA Regulation 1, as amended, of any ocean marine insurance premium charges included in the sum claimed.

(4) The supplier is the producer, manufacturer, processor, or exporter of, or a regular dealer in, the commodity, or furnishes the service covered by said contract and has not employed any person to obtain said contract under any agreement for a commission, percentage, or contingent fee, except to the extent, if any, of the payment of a commission to a bona fide established commercial or selling agent employed by the supplier as disclosed on the reverse of this form.

(5) The supplier has not given or received and will not give or receive by way of side payment, "kickback," or otherwise, any benefit in connection with said contract except as is disclosed on the reverse of this form, or is the result of the adjustments referred to in Paragraph 2.

(6) If the supplier is the producer, manufacturer or processor of a commodity, said contract is not a cost plus-a-percentage-of-cost contract.

(7) The supplier further certifies, on the basis of information obtained from such sources as are available to him, that to the best of his information and belief the purchase price is no higher than the market price (which shall mean the export market price, where such a price is customarily in the trade) prevailing in the United States at the time of purchase, adjusted for differences in the cost of transportation to destination, quality, and terms of payment.

(8) The supplier further certifies that (a) on the basis of information obtained from such sources as are available to him, and to the best of his information and belief, the purchase price is no higher than the price solicited in accordance with the applicable price provisions of ICA Regulation 1, as amended, and he has complied with the rules provided therein; and (b) he has allowed all discounts, including discounts for quantity purchases and prompt payment, customarily allowed his other customers similarly situated.

(9) If the supplier furnishes only a service, he shall not be deemed to certify to paragraphs 7 and 8 but instead certifies that the rate indicated on the reverse of this form for the service rendered does not exceed the prevailing rate, if any, for similar services, or the rate paid to the supplier for similar services by other customers similarly situated.

(10) The supplier has filled in the applicable portions of the invoice-and-contract abstract on the reverse hereof, certifies to the correctness of the information shown therein, and will furnish promptly to the Director of his request such additional information in such form as the Director may require concerning price or any other details of the purchase.

Date

Authorized Signature (see instructions)

Title

(Place executed (City, State, County))

NOTES: (a) Any amendments, deletions of applicable provisions, or modifications will invalidate this certificate. (b) False statements herein are punishable by United States law. (c) The word "Duplicate" must be written after signature on all signed copies other than the original.

ICA-390 (7-58) INTERNATIONAL COOPERATION ADMINISTRATION

(Tear off this stub after filling in form)

INSTRUCTIONS

SUPPLIER'S CERTIFICATE—A signed original and duplicate of form ICA-390 are to accompany each invoice for which payment is requested. Normally, ONLY the original should be signed; if for any reason copies other than the original need to be signed they should be clearly marked "Duplicate" after the signature. Form ICA-390 should be signed by a responsible official of supplier, indicating capacity in which signed. Contracts are not to be submitted to ICA unless absolutely required. In the case of ocean freight, however, charter parties or contracts of affreightment, if any, are to accompany reimbursement documents, except for CIF and C&F transactions. See special instructions below relating to ocean freight. Other requirements of ICA Regulation 1, as amended, including purchasing requirements, are to be complied with. This form may be obtained in limited quantities from banks holding ICA Letters of Commitment, Regional Offices of the Department of Commerce, or International Cooperation Administration, Distribution Section, ADMIN, Washington 25, D. C. Forms may be reproduced, provided the reproduction is identical in content, size and format.

INVOICE INFORMATION (on reverse side)—ICA Procurement Authorization or Project Implementation Order number must be inserted in Block 1 by supplier. The amount shown in Block 1 is the net amount for which the supplier seeks payment; it must not include any commission to an importer's purchasing agent and must be net of all discounts. Commissions paid or to be paid to a commercial or selling agent employed by the contractor or agents of supplier which are included in amount shown in Block 1 must be detailed in Blocks 19, 20, and 21. In Block 2, show source country as defined in § 201.1(m) of ICA Regulation 1. In Block 4, show the bill of lading weight rounded to nearest whole ton; if expressed in other than long tons convert by long tons (2,240 pounds or 40 cubic feet to the ton.) Where a supplier does not arrange for ocean shipment, Blocks 5 through 8 should

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CA-310 (1-58) BACK

INVOICE-AND-CONTRACT ABSTRACT

INVOICE INFORMATION—SEE BACK FOR ITEMS MARKED WITH ASTERISK

1. PROCUREMENT AUTHORIZATION OR PROJECT IMPLEMENTATION ORDER NO.	2. INVOICE AMT. AFTER DISCOUNT	3. SOURCE COUNTRY	4. GROSS LONG TONS

5. VESSEL—NAME	DRILY	DIRTY	TANKER	6. FLAG	7. PORT OF EXIT	8. DATE D/A

9. COMMODITY OR SERVICE—IN ENGLISH	10. SCA CODE	11. INVOICE DATE	12. QUANTITY	13. QUANTITY UNIT	14. UNIT PRICE	15. SHIPPING TERMS

16. SUPPLIER'S NAME, ADDRESS AND SOCIAL SECURITY EMPLOYER NO.	17. CLASS OF SUPPLIER (CHECK ONE) MANUFACTURER, PRODUCER, OR PROCESSOR—PRIMARY SELLER / MERCHANT EXPORTER OR OTHER—SECONDARY SELLER	18. IMPORTER'S NAME AND ADDRESS

INFORMATION AS TO AGENTS' COMMISSIONS, DOMESTIC AND FOREIGN

19. NAMES OF AGENTS	20. ADDRESSES	21. COMMISSIONS IN INVOICE AMT. —PAID OR TO BE PAID
		$

CONTRACT AND PRICE INFORMATION

22. CONTRACT DATE	23. CONTRACT SHIPPING TERMS	24. CONTRACT AMOUNT	25. CONTRACT QUANTITY	26. CONTRACT UNIT PRICE	27. DOMESTIC UNIT PRICE

28. SPECIFY HERE ITEMS AND AMOUNTS THAT WILL ACCOUNT FOR ANY DIFFERENCES BETWEEN CONTRACT, INVOICE, AND DOMESTIC UNIT PRICES

SEE INTERNAL REVENUE SCA-93-C

INSTRUCTIONS (Continued)

...parable block. In block 9, insert the exact description (in English) for each item. Insert the description words commonly employed within the industry. If SCA Commodity Code is unknown, block 10 may be left blank. On a Form SCA-468-C used for a "Non-Schedule Invoice," "Non-Schedule" may be inserted in blocks 10 and 14. Blocks 10 and 15 refer to "FAS and C&F" sale. In block 10 list supplier's SCA Commodity Supplement Number, which SCA exists to determine the participation of small business suppliers in the program.

Class of Supplier—Indicate in block 17 whether (1) manufacturer, producer, or processor of the commodity; or (2) merchant exporter or other secondary seller.

INFORMATION AS TO AGENTS' COMMISSIONS, DOMESTIC AND FOREIGN—Where the element shown in block 2 includes a commission paid or to be paid to agent of supplier, the actual name of such commission, by duplicate and agent, must be entered in block 21. Write "NONE" in block 21 if no commission was involved.

CONTRACT AND PRICE INFORMATION—If there is no formal contract specifically covering the purchase, insert date of confirmation of order in block 22. Block 27 is per unit, consistency, or per shipper's price. In comparing Per Differences between contract, invoice and domestic unit prices, block 28, describe and show the effect of: (1) escalator clauses or extras; (2) if the selling price is established on a date other than the contract date, the price-fixing date; (3) ocean freight charges; (4) ocean marine insurance premiums, if any; (5) export differential, if any.

SPECIAL INSTRUCTIONS FOR OCEAN FREIGHT OTHER THAN C&F AND CIF TRANSACTIONS: Check block 6, Lumen block 4 block 17 quantity in its lower base; subscribe (B) in 14, in block 15 show "Ocean Freight" and in block 16 use "none" for Code. Blocks 11, 12, 13, and 14, are taken from the freight bill. In block 15 show "Collect" or "Prepaid." Check block 17. Give full information as to commissions paid in blocks 19, 20, and 21. Check blocks 22 through 27 but complete only shipment items. Invoice price and price stated in shorter party or statement of advertisement in block 28.

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Pages 12095–12210

PART II

FEDERAL REGISTER

VOLUME 29 NUMBER 179

Washington, Saturday, September 12, 1964

Agency for International Development

[A.I.D. Regulation 1]

Commodity Transactions Financed By A.I.D.

Title 22—FOREIGN RELATIONS

Chapter II—Agency for International Development, Department of State

[A.I.D. Regulation 1]

PART 201—RULES AND PROCEDURES APPLICABLE TO COMMODITY TRANSACTIONS FINANCED BY A.I.D.

Part 201 of Chapter II, Title 22 (A.I.D. Regulation 1), is revised to read as follows:

Subpart A—Definitions and Scope of This Part

Sec.
201.01 Definitions.
201.02 Scope.

Subpart B—Conditions Governing the Eligibility of Procurement Transactions for A.I.D. Financing

201.10 Purpose.
201.11 Eligibility of commodities.
201.12 Eligibility of incidental services.
201.13 Eligibility of delivery services.
201.14 Eligibility of bid bonds and performance guaranties.
201.15 United States flag vessel shipping requirement.

Subpart C—Procurement Procedures—Responsibilities of Importers

201.20 Purpose.
201.21 Notice to supplier.
201.22 Formal competitive bid procedures.
201.23 Other procurement procedures.
201.24 Solicitation of bids and quotations.
201.25 Advance and progress payments for custom-made commodities.
201.26 Bid bonds and performance guaranties.

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201.31 Suppliers of commodities.
201.32 Suppliers of delivery services.
201.33 Prior review of proposed sales.

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201.41 Audit and inspection.
201.42 Re-export of A.I.D.-financed commodities.
201.43 Diversion clause.
201.44 Vesting in A.I.D. of title to commodities.
201.45 Termination or modification of a loan, grant, or implementing document.
201.46 Compensation to supplier if shipment is prohibited.

Subpart F—Payment and Reimbursement

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201.51 Methods of financing.
201.52 Required documents.
201.53 Final date for presentation of documents.

Subpart G—Price Provisions

201.60 Purpose and applicability of this subpart.
201.61 Meaning of terms in this subpart.
201.62 Responsibilities of borrower/grantee and of supplier.
201.63 Maximum prices for commodities.
201.64 Application of the price rules to commodities.
201.65 Rules governing discounts, commissions, and similar allowances.
201.66 Fees payments.
201.67 Maximum freight charges.
201.68 Maximum prices for commodity-related services.

Sec.
201.69 Commodity price subject to escalation.

Subpart H—Rights and Responsibilities of Banks

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201.71 Terms of letters of credit.
201.72 Making payments.
201.73 Limitation on the responsibilities of banks.
201.74 Additional documents for A.I.D.
201.75 Rights of banks.

Subpart I—Rights and Remedies of A.I.D., Waiver Authority, and Transitory Provisions

201.80 Purpose.
201.81 Rights of A.I.D. against borrower/grantee.
201.82 Rights of A.I.D. against suppliers.
201.83 No waiver of alternative rights or remedies by A.I.D.
201.84 Limitation on period for making refund requests.
201.85 Waiver and amendment authority.
201.86 Continuation in effect of certain prior issuances.
201.87 Effective date and transitory provision.

Appendix A—Supplier's Certificate and Agreement with the Agency for International Development.

Appendix B—Instructions for Notice of Proposed Procurement.

AUTHORITY: The provisions of this Part 201 issued under sec. 621, Foreign Assistance Act of 1961; 75 Stat. 445; 22 U.S.C. 2402.

Subpart A—Definitions and Scope of This Regulation

§ 201.01 Definitions.

As used in this Part 201, the following terms shall have the meanings indicated below:

(a) *The Act.* "The Act" means the Foreign Assistance Act of 1961, as amended from time to time.

(b) *A.I.D.* "A.I.D." means the Agency for International Development or any successor agency, including, when applicable, each US AID.

(c) *A.I.D. geographic code.* "A.I.D. geographic code" means a code in the A.I.D. Geographic Code Book which designates a country, a group of countries, or an otherwise defined area.

(d) *AID/W.* "AID/W" means the A.I.D. in Washington, D.C., including any office thereof.

(e) *Approved applicant.* "Approved applicant" means the person or organization designated by the borrower/grantee to establish credits with banks in favor of suppliers or to instruct banks to make payments to suppliers, and includes any agent acting on behalf of such approved applicant.

(f) *Bank.* "Bank" means a banking institution organized under the laws of the United States, or any State, territory or possession thereof, or Puerto Rico or the District of Columbia.

(g) *Borrower/grantee.* "Borrower/grantee" means the government of any cooperating country, or any agency, instrumentality or political subdivision thereof, or any private entity to which A.I.D. directly makes funds available by loan or grant.

(h) *Commodity.* "Commodity" means any material, article, supply, goods or equipment.

(i) *Commodity-related services.* "Commodity-related services" means delivery services and/or incidental services.

(j) *Cooperating country.* "Cooperating country" means any country to which A.I.D. provides any form of assistance under the Act.

(k) *Delivery.* "Delivery" means the transfer to, or for the account of, an importer of the right to possession of a commodity, or the rendering to, or for the account of, an importer of any commodity-related service.

(l) *Delivery services.* "Delivery services" means any service customarily performed in a commerical export transaction which is necessary to effect a physical transfer of commodities from the country of export to the cooperating country. Examples of such services are the following: export packing, local drayage in the source country (including waiting time at the dock), ocean and other freight, loading, heavy lift, wharfage, tollage, switching, dumping and trimming, lighterage, insurance, commodity inspection services, and services of a freight forwarder. "Delivery services" may also include work and materials necessary to meet A.I.D. marking requirements.

(m) *Implementing document.* "Implementing document" means any document issued by A.I.D. which authorizes the use of A.I.D. funds for the procurement of commodities and/or commodity-related services and which specifies conditions which will apply to such procurement.

(n) *Importer.* "Importer" means any person or organization, governmental or otherwise, in the cooperating country who is authorized by the borrower/grantee to use A.I.D. funds under this Regulation for the procurement of commodities, and includes any borrower/grantee who undertakes such procurement.

(o) *Incidental services.* "Incidental services" means the installation or erection of A.I.D.-financed equipment, or the training of personnel in the maintenance, operation and use of such equipment.

(p) *Purchase contract.* "Purchase contract" means any contract or similar arrangement under which a supplier furnishes commodities and/or commodity-related services financed under this Part 201.

(q) *Source.* "Source" means the country from which a commodity is shipped to the cooperating country, or the cooperating country if the commodity is located therein at the time of the purchase. Where, however, a commodity is shipped from a free port or bonded warehouse in the form in which received therein, "source" means the country from which the commodity was shipped to the free port or bonded warehouse.

(r) *Supplier.* "Supplier" means any person or organization, governmental or otherwise, who furnishes commodities and/or commodity-related services financed under this Part 201.

(s) *Supplier's Certificate.* "Supplier's Certificate" means A.I.D. Form 281, "Supplier's Certificate and Agreement with the Agency for International Devel-

opment", including the "Invoice-and-Contract Abstract" on the reverse of such form (Appendix A to this Part 201), or any substitute form which may be prescribed in the letter of commitment, request for the opening of a special letter of credit, or other pertinent implementing document.

(f) *United States.* "United States" means the United States of America, any State, territory or possession thereof, Puerto Rico and the District of Columbia.

(g) *US AID.* "US AID" means the A.I.D. mission or representative to any cooperating country.

The appropriate implementing document will indicate whether and the extent to which this Part 201 shall apply to the procurement of commodities or commodity-related services or both.

(a) The borrower/grantee is responsible for compliance with the applicable provisions of this Part 201 by importers and suppliers, and for assuring that importers and suppliers are informed of the extent to which this Part 201 applies.

(b) Subpart B of this Part 201 sets forth conditions governing the eligibility for A.I.D.-financing of transactions covering commodities and commodity-related services.

(c) Subpart C prescribes procedures which importers shall follow in purchasing commodities.

(d) Subpart D sets forth the responsibilities of suppliers.

(e) Subpart E contains provisions relating to

(1) The diversion of shipments and the vesting in A.I.D. of title to commodities;

(2) The effect of termination or modification of any loan, grant or implementing document; and

(3) A.I.D. audit and inspection rights.

(f) Subpart F describes the financing process and prescribes the documents which shall be submitted to banks and to A.I.D.

(g) Subpart G contains the price tests which shall be met and limitations on amounts and types of payments which A.I.D. will finance.

(h) Subpart H defines the rights and responsibilities of banks.

(i) Subpart I sets out the rights and remedies which are reserved to A.I.D. and provides for the waiver under special circumstances of the provisions of this Part 201. The subpart also contains necessary transitory provisions.

(j) Unless otherwise indicated, references in this Part 201 to subparts or to sections relate to subparts or sections of this Part 201.

Subpart B—Conditions Governing the Eligibility of Procurement Transactions for A.I.D. Financing

§ 201.10 Purpose.

This subpart sets forth requirements for A.I.D. financing applicable to transactions for the procurement of commodities and/or commodity-related services.

§ 201.11 Eligibility of commodities.

To qualify for A.I.D. financing, a commodity procurement transaction shall satisfy the following requirements:

(a) *Description and condition of the commodity.* The commodity shall conform to the description in the implementing document. Unless otherwise authorized by AID/W in writing, the commodity shall be unused, and may not have been disposed of as surplus by any governmental agency.

(b) *Source.*—(1) *General rule.* The source of the commodity shall be a country authorized in the implementing document by name or by reference to an A.I.D. geographic code. In addition, the commodity shall have been mined, grown, or through manufacturing, processing, or assembly produced in a source country authorized in the implementing document.

(2) *Exceptions.* A produced commodity will not be eligible for A.I.D. financing if

(i) It contains any component from countries other than free world countries as listed in A.I.D. geographic code 899; or

(ii) It contains components which were imported into the country of production from such free world countries other than authorized source countries; and

(a) Such components were acquired by the producer in the form in which they were imported; and

(b) The total cost of such components (delivered at the point of production) amounts to more than 10 percent, or such other percentage as A.I.D. may prescribe, of the lowest price (excluding the cost of ocean transportation and marine insurance) at which the supplier makes the commodity available for export sale (whether or not financed by A.I.D.).

(3) *Waiver provision.* AID/W may from time to time waive or modify the requirements of subparagraph (2) (ii) of this § 201.11 (b) if in its view such action is necessary to achieve A.I.D.'s objective of conformity with normal industry practices.

(c) *Date of shipping documents.* The documents required as evidence of shipment under § 201.33(a) (4) shall show that the date of shipment was within the shipping period, if any, specified in the implementing document.

(d) *Medium of transportation.* Shipment shall not be effected

(1) By a transportation medium owned, operated or under the control of any country not included within A.I.D. geographic code 899; or

(2) From the United States on a vessel which A.I.D. has designated ineligible; or

(3) Under any ocean or air charter which has not received prior approval by AID/W.

(e) *Marine insurance.* If A.I.D. determines that the government of a cooperating country, by statute, decree, rule or regulation, discriminates with respect to A.I.D.-financed procurement against any marine insurance company authorized to do business in any state of the United States, then any A.I.D.-financed commodity shipped to the cooperating country shall be insured against marine risks and such insurance shall be placed in the United States with a company or companies authorized to do a marine insurance business in a state of the United States. "Discrimination" within the meaning of this paragraph (e) may be found to exist whenever the effect of governmental action by a cooperating country is to hinder an importer in entering into a c.i.f. contract with a United States supplier or in instructing a United States supplier to place marine insurance in the United States.

(f) *Timely submission of documents.* All documents required under § 201.33 to be submitted by a supplier in order to receive payment or reimbursement shall be submitted to A.I.D. or to a designated bank, whichever is appropriate, on or before the terminal date specified in the letter of commitment, the request for the opening of a special letter of credit, or other implementing document.

(g) *United States Treasury Department regulations.* Procurement transactions shall comply with the requirements of the Foreign Assets Control Regulation and Cuban Assets Control Regulation of the United States Treasury Department.

(h) *Commodities shipped out of free port or bonded warehouse.* No commodity shipped out of a free port or bonded warehouse is eligible for A.I.D. financing if it was shipped to the free port or bonded warehouse without compliance with the requirements set forth in paragraph (d) (1) and (2) of this § 201.11.

(i) *Purchase price.* The purchase price for the commodity shall satisfy the requirements of Subpart G.

§ 201.12 Eligibility of incidental services.

Incidental services may be financed under the same implementing document which makes funds available for the procurement of equipment if

(a) The supplier does not procure such services with local currency in the cooperating country; and

(b) Such services are specified in the purchase contract relating to the equipment.

§ 201.13 Eligibility of delivery services.

Delivery services will be financed by A.I.D. in the manner provided in this section.

(a) *General.* Delivery services which relate to A.I.D.-financed commodities may be financed under the implementing document which authorizes the purchase of the commodities or under a separate implementing document.

(b) *Conditions and limitations.*—(1) *Freight.* Unless otherwise authorized, A.I.D. will not finance freight

(i) For shipment beyond the point of entry in the cooperating country; or

(ii) On any non-U.S. flag transportation medium carrying the commodities to the cooperating country, or to or from a free port or bonded warehouse; or

(iii) On any vessel designated by A.I.D. as ineligible to carry A.I.D.-financed cargo; or

(iv) On any liner vessel for which the rate applicable to the commodity shipped and applying to both A.I.D.-financed and non-A.I.D.-financed cargo has not been filed with the Federal Maritime Commission (whether or not such filing is required by the Federal Maritime Commission); or

(v) Under any ocean or air charter covering full or part cargo (whether for a single voyage, consecutive voyages, or a time period) which has not received prior approval by AID/W, (Resources Transportation Division); or

(vi) Which is attributable to brokerage commissions which exceed the limitations specified in § 201.68(e) or to address commissions, dead freight, or demurrage.

(2) *Inspection services.* A.I.D. will finance inspection of A.I.D.-financed commodities if such inspection is performed by independent inspectors at the request of the importer and is either customary in export transactions for the commodity involved or is necessary to determine conformity of the commodities to the contract.

(3) *Insurance.* (i) A.I.D. will finance U.S. dollar premiums for marine insurance including war risk on A.I.D.-financed commodities, if

(a) The insurance is placed on a competitive basis, in an authorized source country, with a company or companies authorized to do a marine insurance business in any state of the United States; and

(b) Such insurance is placed either in accordance with the terms of the commodity purchase contract or by, or on the written instructions of, the importer; and

(c) Insurance coverage relates only to the period during which the commodities are in transit to the cooperating country, except that it may include coverage under a so-called "warehouse-to-warehouse" clause; and

(d) The premiums do not exceed the limitations contained in § 201.68.

(ii) Within the meaning of § 201.11(e), as well as of this § 201.13(b)(3), insurance is "placed" in a country only if payment of the insurance premium is made in, and the insurance policy is issued by, an insurance company office located in said country. "On a competitive basis" means under conditions of effective competition, but not necessarily under formal competitive bid procedures.

§ 201.14 Eligibility of bid bonds and performance guaranties.

The cost of any bid bond posted by a successful bidder or of any guaranty of performance posted by a supplier is eligible for financing under the implementing document to the extent that the principal amount of the bond or guaranty does not exceed the amount customary in international trade for the type of transaction and commodity involved: *Provided*, That the bid bond and guarantee of performance must be payable in United States dollars and must conform to the requirements of the invitation for bids or the contract, as applicable.

§ 201.15 United States flag-vessel shipping requirement.

(a) *General requirement.* At least fifty percent of the gross tonnage of all commodities financed with A.I.D. dollar funds and transported to the cooperating country on ocean vessels shall be transported on privately owned United States flag commercial vessels. The foregoing requirement shall apply separately for any dry bulk carrier shipments, dry cargo liner shipments and tanker shipments from each of the following geographical areas:

(1) United States;
(2) Europe and Africa;
(3) Near East and South Asia;
(4) Latin America and Canada; and
(5) Far East.

(b) *Responsibility of borrower/grantee.* The borrower/grantee shall be responsible for assuring compliance with the requirements of paragraph (a) of this § 201.15 and for imposing upon subborrowers, contractors and importers such requirements regarding shipping arrangements with suppliers as will assure discharge of this responsibility. Such compliance shall be achieved during each United States fiscal year (July 1–June 30) as well as each quarterly period thereof, or during such other period or periods as may be specified by A.I.D. in agreements or implementing documents.

(c) *Non-availability of United States flag vessels.* Upon application of the borrower/grantee, AID/W (Resources Transportation Division) will determine and advise the borrower/grantee whether or not a privately-owned United States flag commercial vessel is available for a specific shipment of commodities at fair and reasonable rates. Such determination and advice of nonavailability does not relieve the borrower/grantee of the obligation to comply with the requirements of paragraphs (a) and (b) of this § 201.15 except to the extent that A.I.D. after reviewing shipments by the borrower/grantee during the fiscal year quarterly period thereof, or other relevant time period, determines that such compliance has not been possible. Any such determination and advice will not render transportation costs on foreign flag vessels eligible for A.I.D. financing.

Subpart C—Procurement Procedures—Responsibilities of Importers

§ 201.20 Purpose.

This subpart prescribes procurement procedures which shall apply to an importer whenever a commodity procurement is to be financed by A.I.D.

§ 201.21 Duties to supplier.

The importer is responsible for providing the supplier with the following information (either through the invitation for bids or otherwise):

(a) Notice that the transaction is to be financed by A.I.D. under this Part 201;

(b) The identification number of the implementing document; and

(c) All additional information prerequisite to A.I.D. financing and contained in the instructions from the borrower/grantee to the importer (for example, eligible source of commodity, periods during which deliveries must be made, shipping provisions, and documentation requirements).

§ 201.22 Formal competitive bid procedures.

If the implementing document requires, or if the importer elects procurement through formal competitive bid procedures, the following minimum requirements shall apply:

(a) *Contents of the invitation for bids.* Every invitation for bids and every attachment or amendment to an invitation shall be in the English language. The invitation shall contain the following:

(1) *Statement of requirements.* The invitation shall state specifically that formal competitive bid procedures apply. The terms and conditions which apply to the procurement shall be clearly indicated, including any factors other than price to be used in evaluation. Commodity specifications shall be stated in terms of United States standards, in a non-restrictive manner, and in sufficient detail to permit maximum response from prospective suppliers.

(2) *Statement regarding submission of bids.* Invitations for bids shall state the applicable invitation number, the address to which bids are to be sent, the closing hour and date for submission and the date, hour and place for public opening of bids. If additional drawings, details, or regulations or forms are necessary for bidding, the invitation shall state where such material may be obtained.

(3) *Statement regarding this part.* Invitations for bids shall expressly indicate the extent to which any resulting contract is subject to the requirements of this Part 201.

(b) *Advertising the invitation for bids.* The invitation for bids shall be advertised in the manner described in § 201.24(a)(1).

(c) *Handling bids.* Bids received shall be held intact and sealed and shall be safeguarded against disclosure of contents prior to bid opening. The bids shall be opened publicly as specified in the bid invitation, and all properly submitted bids shall be considered. Direct submission of a bid by a prospective supplier, rather than through an agent or other representative of the supplier in the cooperating country, shall not be cause for rejection.

(d) *Awards.* Every award shall be made to that responsible bidder whose bid, conforming to the invitation for bids, is lowest in price, unless another bid is demonstrably more advantageous to the importer because of any factor (other than price) set forth in the invitation for bids as a factor to be considered in the evaluation of bids.

(e) *Submission of award information to A.I.D.* The importer shall complete Form A.I.D. 11–B3 "Abstract of Bids", identifying thereon the successful bidder, and noting any two or more identical bids or any evidence of suspected collusion. If the lowest bid has not been accepted, the importer shall justify the award and shall append to the Abstract

a statement of reasons for rejecting all lower bids. The Abstract and any justification statement shall be sent in triplicate to the Office of the Controller, A.I.D., Washington, D.C., to arrive within twenty days after the award of the contract.

§ 201.23 Other procurement procedures.

(a) *General requirements.* Procurement not subject to § 201.22 shall be made in accordance with good commercial practice. Specifications shall be expressed in terms of United States standards and shall be in the English language. All solicitations of quotations and offers shall be made uniformly to a reasonable number of prospective suppliers.

(b) *Notification as adequate solicitation.* If the notification requirements of § 201.24(a)(2) apply, such notification shall be deemed an adequate solicitation of quotations and offers, and all supplementary solicitations shall be consistent with such notification.

(c) *Notice of quotations and offers received.* A.I.D. may require that an importer furnish an abstract in the English language and identify therein all offers or quotations received, the offer accepted or order placed, the price, the quantity, the name and address of all persons submitting offers or quotations and of their principals, if any (including manufacturers or processors of the commodity).

§ 201.24 Solicitation of bids and quotations.

(a) *Notification requirements.* Except as paragraphs (b) or (c) of this § 201.24 may apply, the importer shall comply with the minimum notification requirements set forth in this paragraph (a). He may take such additional steps to notify prospective suppliers as are consistent with prudent procurement.

(1) *Under formal competitive bid procedures.* Invitations for bids must be advertised in the following manner:

(i) *Submission to A.I.D.* Three copies of the invitation for bids must be sent to the Office of Small Business, A.I.D., Washington, D.C., and fifty copies of the invitation shall be sent to a place in the United States designated by the borrower/grantee and agreed to by A.I.D. Invitations must be available to prospective suppliers free of charge, unless otherwise authorized by the Office of Small Business AID/W. All copies must be accompanied by a complete set of any additional drawings, details, applicable government regulations, and other pertinent data necessary to the preparation of bids, or make reference to such additional documents as are readily available to the public or are available for public inspection.

(ii) *Time of submission.* Copies of the invitation for bids must be furnished sufficiently in advance of the bid-closing date to permit adequate preparation of bids. Unless a longer period is prescribed by the Office of Small Business, AID/W, or upon application of the importer a longer period is authorized by such Office, the required copies shall be sent so as to arrive in the Office of Small Business, AID/W, at least forty-five days in advance of the bid-closing date.

(2) *Under other procurement procedures.* In procurement other than by formal competitive bids, the solicitation of quotations and offers must include the following: The importer shall submit, in triplicate, to the Office of Small Business, A.I.D., Washington, D.C., a notice of proposed procurement, which shall include commodity specifications in terms of United States standards, and other procurement data, in the English language and in the format set out in "Instructions for Notice of Proposed Procurement" (Appendix B to this Part 201). No importer, importer's agent or representative, or anyone acting in his behalf, shall accept any offer or place any order or agree to accept any offer or place any order until forty-five days after the expected arrival of such form at the Office of Small Business, AID/W, in the course of mail. The Office of Small Business may require a longer period or, upon application of the importer, authorize a lesser period.

(3) *Resubmission of notifications to A.I.D.* A.I.D. may require the revision and resubmission to A.I.D. of any invitation for bids which does not comply with the requirements of § 201.22(a) or of subparagraph (1) of this § 201.24(a), or of any notice of proposed procurement which does not comply with the requirements of subparagraph (2) of this § 201.24(a). In such cases the importer shall effect changes necessary to assure compliance with the applicable requirements. The bid-closing date or the date before which an order may not be placed or accepted will be extended as A.I.D. (Office of Small Business) may instruct. A.I.D. (Office of Small Business) may, when it determines it necessary, return to the importer for revision or resubmission the invitation for bids or the notice of proposed procurement. In such cases the revised invitation or notice must be resubmitted in accordance with all the requirements of this § 201.24 (a) for original submission to A.I.D.

(b) *Exemption for small value procurement.* Any commodity procurement undertaken by an importer under a single import license or other authority where the estimated landed cost of all purchases made by him under a single three-digit A.I.D. commodity code is less than $5,000 is exempted from the notification requirements of paragraph (a) of this § 201.24. This exemption does not apply to procurement undertaken in amounts of less than $5,000 for the purpose, or with the effect, of evading the requirements of § 201.24(a).

(c) *Waiver provisions.* A.I.D. may waive any notification requirement in the following situations:

(1) *Procurement under certain special supplier-importer relationships.* (i) A supplier may apply for a waiver for the benefit of a named importer if

(a) The procurement concerns a registered brand name commodity

(1) Which is for resale by the importer;

(2) For which the importer is a regularly authorized distributor or dealer of the supplier; and

(3) For which the supplier is the sole distributor; or

(b) The procurement concerns a commodity

(1) Which is for resale by the importer;

(2) For which the importer is a regularly authorized distributor or dealer of the supplier; and

(3) For which the supplier is the manufacturer or the manufacturer's regularly authorized exporter for the destination involved; or

(c) The procurement concerns a commodity

(1) Which is procured for manufacture, processing or assembly, and resale of the end-product by the importer;

(2) For which the importer is a regularly authorized distributor or dealer of the supplier; and

(3) For which the supplier is the manufacturer or the manufacturer's regularly authorized exporter for the destination involved; or

(d) The commodity is procured under such other commercial relationship which appears to A.I.D. to merit a waiver from the notification requirements.

(ii) Applications for waiver shall be sent by the supplier to the Office of Small Business, A.I.D., Washington, D.C., and shall include the following:

(a) The name and address of the importer who serves as the authorized distributor or dealer;

(b) The specific commodities covered by the supplier-importer agreement;

(c) Certification concerning the nature and duration of the commercial relationship between the supplier and the importer, supported by a copy or abstract of the pertinent provisions of any underlying written agreement between the supplier and the importer; and

(d) If the supplier is not the manufacturer of the commodity, a statement containing the pertinent provisions of any underlying agreement between the supplier and the manufacturer.

(iii) The waiver, if granted, will be forwarded in duplicate to the supplier. The supplier is responsible for forwarding one copy of the waiver to the importer and for advising the Office of Small Business, AID/W, of any change in his agreement with the importer which may affect the waiver granted by A.I.D.

(2) *Proprietary procurement.* (i) Procurement where A.I.D. has determined that, in order to assure the interchangeability or standardization of equipment, or because of special design requirements, or for any similar reason, purchase of a commodity by reference to a particular specification, trade name, or designation is necessary.

(ii) Application for waivers shall be made in writing to A.I.D. by the importer, and shall include supporting justification together with the recommendations of the borrower/grantee. In the absence of other instructions, such applications shall be submitted to the US AID for transmittal to AID/W. Notice of approval or rejection of any such application for a waiver will normally be transmitted to the importer through the US AID.

(3) *Emergency procurement.* (i) Commodity procurement necessary to avoid a serious delay in project comple-

tion or in a plant's production, or to avoid a substantial increase in the cost thereof, if the procurement cannot be effected within the time limitations prescribed by § 201.24(a) for notification procedures.

(ii) A request for an emergency procurement waiver shall be made by the importer to the US AID. The request shall state the facts justifying such emergency procurement and shall bear the endorsement of the borrower/grantee. Emergency procurement requires the prior written approval of the US AID.

(d) *Special situations.* (i) Procurement in special situations. If AID/W has determined that it would be impracticable or inconsistent with the purposes of the Act to require adherence to the notification procedures prescribed in § 201.24(a).

(ii) A request for a special situation waiver shall be made by the importer to the US AID. The request shall justify the procurement and shall bear the endorsement of the borrower/grantee. In the absence of other instructions, the US AID shall transmit the request to AID/W for decision.

§ 201.25 Advance and progress payments for custom-made commodities.

(a) Advance or progress payments prior to shipment may be made with A.I.D. funds if the procurement involves any commodity made to the special specifications of the importer and if prior written approval to make such payments has been obtained from A.I.D. by the importer, through the borrower/grantee, or if such payments are authorized in the implementing document. Any request for A.I.D. approval may be submitted either to AID/W or to the US AID for transmittal to AID/W. A.I.D. will consider any such request only if

(1) The total purchase price exceeds $100,000;

(2) Each payment is at least ten percent of such price; and

(3) The total of all payments prior to shipment does not exceed eighty percent of the purchase price.

(b) A.I.D. may require the supplier to post in A.I.D.'s favor either a guaranty of performance or a prepayment bond equal to the amount of the contract. A.I.D. may impose such further conditions as it deems appropriate.

§ 201.26 Bid bonds and performance guaranties.

Whenever the importer requires the posting of a bid bond or performance guaranty, the type of bond or guaranty (whether certified check, irrevocable letter of credit, bank bond, bank guaranty, surety bond, or otherwise) shall be at the option of the bidder or supplier. Posted bid bonds shall be returned to unsuccessful bidders promptly after an award is made. Unless converted to a required guaranty of performance, any bid bond posted by the successful bidder shall also be returned promptly. Performance guaranties (as distinguished from commodity warranties of quality or performance) shall be cancelled no later than thirty days after completion of the contract performance guaranteed.

Subpart D—Responsibilities of Suppliers

§ 201.30 Purpose.

This subpart establishes the responsibilities of suppliers who furnish commodities and/or commodity-related services. The subpart also establishes procedures for prior review by A.I.D. of relevant contract data.

§ 201.31 Suppliers of commodities.

(a) *Performance of the sales contract.* The supplier of commodities shall comply with the terms and conditions of his contract with the importer and of any letter of credit under which he secures payment.

(b) *Eligibility of commodities.* The supplier shall fulfill his responsibilities under § 201.11 by assuring that

(1) The commodity conforms to the description contained in his contract and letter of credit and, unless otherwise authorized by A.I.D. in writing, the commodity is unused and has not been disposed of as surplus by any governmental agency;

(2) The source of the commodity complies with the provisions of § 201.11(b), relating to source as required by his contract or letter of credit, and with the provisions of § 201.11(h), relating to commodities shipped out of free port or bonded warehouse, if the supplier arranged transportation to the free port or bonded warehouse;

(3) The provisions of § 201.11(d) relating to the medium of transportation are complied with to the extent that the supplier arranges such transportation;

(4) All documents required by § 201.32 to be submitted by the supplier to receive payment are submitted by him on or before the terminal date specified in the letter of credit, or, if there is no letter of credit, in his contract;

(5) The provisions of the U.S. Treasury Department Foreign Assets Control Regulation and Cuban Assets Control Regulation are complied with; and

(6) The purchase price of the commodity meets the requirements of Subpart G of this Part 201 applicable to the supplier.

(c) *Eligibility of delivery services.* The supplier of commodities shall be responsible for assuring that any delivery services obtained by him for his own or for the importer's account comply with the requirements (other than those relating to freight rates) of § 201.13 and, if required by A.I.D., for assuring that any shipping documents obtained by him contain an appropriate diversion clause pursuant to § 201.42. The supplier shall deliver to A.I.D. any shipping documents available to him whenever such delivery is requested by A.I.D.

(d) *Commodity marking.*—(1) *Affixation of emblem and identification number.* The supplier shall be responsible for assuring that all commodities and their shipping containers, whether shipped from the United States or from any other source country, carry the official A.I.D. (clasped hands) emblem and, in addition, in the case of commodities furnished to countries participating in the Alliance for Progress, the Alliance for Progress (flaming torch) emblem. Emblems shall be affixed by metal plate, decalcomania, stencil, label, tag, or other means, depending upon the type of commodity or shipping container and the nature of the surface to be marked. The emblem placed on the commodities shall be as durable as the trademark, company or brand name affixed by the producer; the emblem on each shipping container shall be affixed in a manner which assures that the emblem will remain legible until the container reaches the consignee. Upon each shipping container the last set of digits of the identification number of the pertinent implementing document shall be marked in characters at least equal in height to the shipper's marks.

(i) *Size of emblems.* The size of an emblem may vary depending upon the size of the commodity and the size of the package or shipping container. The emblem shall in every case be large enough to be clearly visible at a reasonable distance.

(ii) *Design and color of emblems.* Emblems shall conform in design and color to samples available from AID/W (Office of Small Business) and from the US AID.

(2) *Exception to requirement for affixation of emblems.* To the extent compliance is impracticable, affixation shall not be required for

(i) Raw materials shipped in bulk (including grain, coal, petroleum, oil and lubricants);

(ii) Vegetable fibers packaged in bales; and

(iii) Semifinished products which are not packaged in any way.

(3) *Waiver.* If compliance with the marking requirement is found to be impracticable with respect to other commodities not excepted by subparagraph (2) of this § 201.31(d), the supplier (or, when appropriate, the borrower/grantee) may request AID/W (Office of Small Business) for a waiver.

(4) *Display of emblems on ships.* The official A.I.D. (clasped hands) emblem, and, in addition, in the case of shipments to countries participating in the Alliance for Progress, the Alliance for Progress (flaming torch) emblem shall be prominently displayed on all ships during loading and unloading when their cargoes consist entirely of A.I.D.-financed goods. Ship charterers shall insert in charter party agreements instructions relating to the display of A.I.D. emblems.

(e) *Export licenses.* The supplier shall assure that all necessary export licenses are obtained.

(f) *Airmail distribution of shipping documents.* In addition to customary commercial documents, distribution the supplier shall, at the time of loading the commodities or as soon as practicable thereafter, airmail one set of the following documents to the Controller, US AID, c/o American Embassy in the capital city of the cooperating country to which shipment is being made, or to such other address as is designated to him: a non-negotiable copy of the ocean or charter party bill of lading or other shipping document, supplier's invoice, and packing list. The supplier shall indicate

on each such document the number of the applicable implementing document, if known to the supplier.

(g) *Adjustment refunds, credits, and allowances.* All adjustments in the purchase price in an A.I.D.-financed transaction in favor of the importer arising out of the terms of the contract or the customs of the trade shall be made by the supplier in the form of a dollar payment to A.I.D. Any such payment shall be transmitted to the Office of the Controller, A.I.D., Washington, D.C., and shall be accompanied by a statement explaining the adjustment and shall specify the name and address of the importer, the date and amount of the original invoice, and the identification number of the implementing document, if known, under which the original transaction was financed. A.I.D. will advise the borrower/grantee of such adjustment refunds received. Despatch earned by the supplier, other than despatch earned at the port of loading on c.i.f. and c.&f. shipments, shall be refunded to A.I.D. in accordance with the provision of § 201.67(a)(5).

(h) *Vesting in A.I.D. of title to commodities.* The supplier shall be responsible for compliance with the provisions of § 201.44 applicable to him.

(i) *Termination or modification of A.I.D. financing.* The supplier shall be responsible for compliance with the provisions of § 201.45 applicable to him.

§ 201.32 Suppliers of delivery services.

(a) *Performance of the service contract.* The supplier of delivery services financed by A.I.D. shall comply with the terms and conditions of his contract to supply delivery services.

(b) *Emblems.* A supplier of ocean transportation services shall assure that the A.I.D. emblem and, where applicable, the Alliance for Progress emblem are prominently displayed, during loading and unloading, on any ship whose cargo consists entirety of A.I.D.-financed commodities.

(c) *Adjustments in the price of delivery services.* The supplier of delivery services shall pay to the Controller, A.I.D., Washington, D.C., all adjustments in the purchase price in favor of the importer (or person purchasing the ocean transportation services) arising out of the terms of the contract or the customs of the trade. Any such payment shall be accompanied by a statement explaining the adjustment and shall specify the name and address of the importer or other person for whom the adjustment is made, the date and amount of the original invoice, and the identification number of the implementing document, if known, under which the original transaction was financed.

§ 201.33 Prior review of proposed sales.

A.I.D. may require that a supplier submit to A.I.D. for prior review any proposed sale of commodities or of commodity-related services which is to be financed by A.I.D. Upon being notified by A.I.D. that such prior review will be required, the supplier shall submit to A.I.D. for review all proposed transactions of the type covered by the notification in accordance with instructions contained therein. The supplier shall also provide any further information, documentation, or certification which A.I.D. may specify after review of a proposed transaction. A.I.D. will notify the supplier of any special documents or certifications which the supplier must submit in order to obtain payment under such transactions and will forward to the banks appropriate amendments to letters of commitment or to requests for the opening of a special letter of credit.

Subpart E—General Provisions Relating to A.I.D. Financing of Commodities and Commodity-Related Services

§ 201.40 Purpose.

This subpart sets forth certain provisions of general application to transactions subject to this Part 201.

§ 201.41 Audit and inspection.

The borrower/grantee shall maintain records adequate to document the arrival and disposition in the cooperating country of all commodities financed by A.I.D. and to identify the importer (or the first purchaser or transferee if the commodity is imported by the borrower/grantee) for a period of five years following the date of payment or reimbursement by A.I.D. or for such other period as A.I.D. and the borrower/grantee agree. In addition, the borrower/grantee or the importer shall, to the extent either exercises control or custody over the commodities, permit A.I.D. or any of its authorized representatives at all reasonable times during the five-year or other agreed period to inspect the commodities at any point, including the point of use, and to inspect all records and documents pertaining to such commodities.

§ 201.42 Re-export of A.I.D.-financed commodities.

Unless specifically authorized by A.I.D., commodities imported into a cooperating country under A.I.D. financing may not be exported in the same or substantially in the same form from the cooperating country. In the event of any unauthorized re-export, the borrower/grantee shall pay promptly to A.I.D., upon demand, the entire amount reimbursed or such lesser or greater amount as A.I.D. may deem appropriate under the circumstances of the particular transaction. Such an amount shall in no event, however, exceed the greater of either the amount reimbursed or the amount realized from the re-export.

§ 201.43 Diversion clause.

A.I.D. may require that charter parties, bills of lading, or other ocean shipping documents covering A.I.D.-financed commodities contain a clause substantially as follows:

A.I.D. may at any time prior to unloading prescribe a different port of discharge from among the ports covered by the applicable conference tariff. Diversion charges shall apply in accordance with the tariff. Deviation insurance and extra handling costs actually incurred shall be reimbursed.

§ 201.44 Vesting in A.I.D. of title to commodities.

(a) *Vesting upon order of A.I.D.* A.I.D. may direct that title to A.I.D.-financed commodities in transit to a cooperating country shall be vested in A.I.D. if in the opinion of A.I.D. such action is necessary to assure compliance with the provisions or purposes of any act of Congress.

(1) *Rights of A.I.D. upon vesting of title.* In accordance with instructions by A.I.D., the borrower/grantee, supplier, and bank shall transfer such negotiable bills of lading, suppliers' invoices, packing lists, inspection certificates or other designated documents relating to the commodities as are in, or may come into, their possession.

(2) *Diversion of commodities.* A.I.D. may direct the master or operator of a vessel or an inland carrier carrying the commodities, to divert them away from the port or other designation specified in the shipping documents and to deliver them at such other destination as A.I.D. may designate.

(b) *Financial responsibility of A.I.D. under vesting order.* (1) A.I.D. will reimburse a supplier who has not already received payment under the sales contract for all commodities with respect to which A.I.D. has taken title under a vesting order.

(2) A.I.D. will assume the responsibility for any extra costs (including the costs of marine insurance and handling) which are incurred as a result of a diversion. With respect to liner shipments, such costs shall not exceed diversion charges as per tariff, and shall include only those deviation insurance and extra handling costs which are actually incurred.

(3) A.I.D. shall incur no liability to the borrower/grantee, the importer, or to the approved applicant by reason of any order which vests in A.I.D. title to commodities, or by reason of any request for the diversion of commodities.

§ 201.45 Termination or modification of a loan, grant or implementing document.

(a) *Effect of termination or modification.* (1) Except as provided in subparagraph (2) of this § 201.45(a), the availability of A.I.D. funds to finance the procurement of commodities and commodity-related services shall terminate or shall be modified, whichever and to the same extent that the implementing document, letter of commitment or special letter of credit which relates to such delivery is terminated or modified by operation of provisions contained in the document or by the exercise of rights otherwise reserved to A.I.D.

(2) Unless the supplier and A.I.D. agree otherwise, to the extent that the supplier has received an irrevocable letter of credit from a bank under an A.I.D. letter of commitment, the purchase contract shall be affected only to the extent necessary to comply with any vesting order issued by A.I.D. in accordance with § 201.44.

(b) *Responsibilities of parties after termination of modification of A.I.D. financing.* Upon termination or modifi-

cation of A.I.D. financing of commodities or commodity-related services, the supplier, importer and approved applicant shall make such arrangements as are necessary to obtain the cancellation or modification of any letter of credit in favor of the supplier.

§ 201.46 Compensation to supplier if shipment is prohibited.

(a) *Payment to supplier.* A.I.D. shall make appropriate payment to a supplier for the value of A.I.D.-financed commodities available for immediate shipment from the United States if all the following conditions are satisfied:

(1) Shipment is prohibited by order of the United States Government and such order has general application to all shipments to the cooperating country.

(2) Payment may not be made by the bank under the terms of the letter of credit or payment instructions.

(3) The supplier is unable to dispose of the commodities without loss.

(4) The supplier tenders to A.I.D. a negotiable warehouse receipt covering the commodities in question and presents to A.I.D. such other documentation required by § 201.52 as may be appropriate under the circumstances.

(b) *Other settlement.* In lieu of accepting title to the commodities, A.I.D. may negotiate with the supplier such other settlement as may be fair and equitable under the circumstances.

Subpart F—Payment and Reimbursement

§ 201.50 Purpose.

This subpart describes:

(a) The methods by which A.I.D. will make payment or reimbursement for commodities and commodity-related services which have been furnished;

(b) The documentation required to be submitted to A.I.D. for the purpose of obtaining such payment or reimbursement; and

(c) The terminal date for presentation of documents which A.I.D. requires as a condition for reimbursement.

§ 201.51 Methods of financing.

In procurement subject to this Part 201 the following methods of financing may be employed by A.I.D. In each case, the method of financing shall be consistent with provisions in the pertinent implementing documents.

(a) *Direct reimbursement.* Upon presentation to A.I.D. of the documents specified in § 201.52, a borrower/grantee will be reimbursed for the cost of commodities and commodity-related services procured by the borrower/grantee directly or procured by other importers with the authorization of the borrower/grantee, if such commodities or services are eligible under the implementing document and under this Part 201 for A.I.D. financing.

(b) *Letter of commitment to a bank.* At the request of the borrower/grantee, A.I.D. will issue a letter of commitment to a bank for a specified amount in dollars. Reimbursement to a bank will be in accordance with the terms of such letter of commitment for eligible payments made for the account of an approved applicant. Any such payment by a bank made in anticipation of a letter of commitment and falling within the scope of payments authorized by such letter when issued will be deemed to be a payment to be reimbursed by A.I.D. thereunder.

(1) *Requests for letters of commitment.* Requests for the issuance of letters of commitment shall be in the English language and shall be submitted to A.I.D. by the borrower/grantee in duplicate. They shall contain the following:

(i) Identification of the implementing document;

(ii) The dollar amount of the letter of commitment;

(iii) The name and address of the bank to which the letter of commitment is to be issued;

(iv) The name and address of the approved applicant;

(v) The expiration date to be stated in the letter of commitment, which shall be not later than the final date specified in the implementing document for submission of documentation to the bank as a basis for disbursement against the letter of commitment, except that, if a terminal shipping date is provided in the implementing document, the expiration date shall be the last day of the month following the month in which the terminal shipping date occurs; and

(vi) Identification of the items to be financed under the letter of commitment (described, if practicable, in terms of the A.I.D. 3- or 4-digit commodity code).

(2) *Approved applicant's request to bank—(i) Form and effect of request.* An approved applicant may apply to the bank holding a letter of commitment for the issuance, confirmation, or advice of a commercial letter of credit for the benefit of a supplier, or may instruct the bank to make payments at sight to such supplier, or may instruct the bank to make payments at sight to or for the account of the borrower/grantee.

(ii) *Borrower/grantee assignment under letter of commitment.* The borrower/grantee's request to A.I.D. for a letter of commitment shall be deemed notification to A.I.D. of assignment of any rights to receive reimbursement for the specified funds under the related implementing document. A.I.D. by issuance of the letter of commitment shall be deemed to have consented to such assignment. Any such assignment or consent shall inure to the benefit of the bank's legal successors and assignees.

(iii) *Requirements imposed by bank.* The borrower/grantee and the approved applicant shall be deemed to have consented to imposition by the bank upon the beneficiary of any letter of credit or payment instruction of such requirements as the bank deems necessary in order to comply with its applicable obligations to A.I.D. Such consent shall be deemed an express condition incorporated in any request of the approved applicant under subparagraph (2) (i) of this § 201.51 (b).

(3) *Reimbursement of bank.* Upon presentation to A.I.D. of the documents described in § 201.52, A.I.D. will reimburse the bank for any amounts paid by it in dollars to or on behalf of the approved applicant pursuant to a letter of commitment, subject, however, to compliance by the bank with the requirements of Subpart H. Such documents in the normal course should be presented to A.I.D. promptly. Bank charges will be eligible for reimbursement if authorized in the letter of commitment. Reimbursement will be made by check within thirty days.

(c) *Special letter of credit.* Upon application of the borrower/grantee, A.I.D. may request a bank to open a special letter of credit, revocable or irrevocable, for a designated beneficiary.

(1) *Financing instructions.* The beneficiary of the special letter of credit may instruct the bank to issue subsidiary letters of credit, or to make payments at sight, to designated parties or may claim reimbursement from the bank for payments which it has made to suppliers upon submission to the bank of the documents required under § 201.52. When issuing subsidiary letters of credit to parties designated by the beneficiary of the special letter of credit, the bank will instruct such parties to make reference in their documents to the A.I.D. reference number indicated in the A.I.D. request for the opening of a special letter of credit.

(2) *Reimbursement of bank.* Upon presentation to A.I.D. of the documents described in § 201.52, A.I.D. will reimburse the bank for any amounts paid by it in dollars pursuant to the letter of credit, subject, however, to compliance by the bank with the requirements of Subpart H. Such documents in the normal course should be presented to A.I.D. promptly. Bank charges will be eligible for reimbursement if authorized in the A.I.D. request for the opening of a special letter of credit. Reimbursement will be made by check within thirty days.

(3) *Availability of documents.* The bank shall make available to A.I.D., upon request, a copy of each subsidiary letter of credit issued; a copy of each payment instruction or request; and a copy of each document in its possession received by it against payment.

(d) *Bank charges under letter of commitment or special letter of credit.* (1) To claim reimbursement for commissions, transfers or other charges, not including interest on advances, the bank shall submit Voucher SF 1034 and shall attach thereto a copy of the payment advice which identifies the costs being billed.

(2) To claim reimbursement for interest on advances, the bank shall claim reimbursement on Voucher SF 1034, attaching thereto

(i) The monthly statement of advance account established under the letter of commitment or special letter of credit, in duplicate, showing

(a) The opening balance;

(b) The date and amount of such charge attributable to the letter of commitment or special letter of credit, indicating the number of the letter of commitment or special letter of credit, subsidiary letter of credit, or payment instruction or request under which the charge was made;

(c) The date and amount of each A.I.D. reimbursement to the bank, indicating either the A.I.D. bureau voucher number or the number of the letter of commitment or special letter of credit, subsidiary letter of credit, or payment instruction or request under which the payment was made; and

(d) The closing balance;

(ii) The bank's monthly advice of charge, in duplicate, showing

(a) The outstanding balance in the advance account on each day of the period covered; and

(b) The amount of interest charged during the period.

(3) *Certification.* Each claim for reimbursement shall have endorsed thereon or attached thereto a certification by an authorized representative of the bank that the charges for which payment is being claimed are in accordance with the schedule of charges agreed on between the bank and the approved applicant or beneficiary.

(4) *Report.* The bank shall render a report as of the end of each calendar month to AID/W (Office of the Controller) and to the approved applicant or beneficiary. The report shall contain the following information based upon actual paid invoices and paid bank charges:

(i) The balance as of the end of the previous reporting period;

(ii) Increases or decreases during the current reporting period in the authorized amount of the letter of commitment or special letter of credit;

(iii) Total payments made during the current reporting period; and

(iv) The balance as of the close of the current reporting period.

§ 201.32 Required documents.

(a) *Commodities and commodity-related services.* Claims for reimbursement or payment with respect to commodities and commodity-related services shall be supported by the documents listed in subparagraphs (1) through (6) of this § 201.32(a), or by such other documents as may be required in the implementing document, letter of commitment, or request for the opening of a special letter of credit. Each document shall indicate the identification number of the applicable implementing document, letter of commitment, or request for the opening of a special letter of credit.

(1) *Voucher.* Voucher SF 1034 with three copies, to be prepared by the borrower/grantee, by the approved applicant, or by the bank as assignee or agent for the approved applicant.

(2) *Supplier's invoice.* (i) One copy of the supplier's detailed invoice showing the following:

(a) The name and address of the importer;

(b) The quantity and the description of each item shipped, in sufficient detail for ready identification;

(c) The total gross sales price;

(d) The total net sales price (determined by deducting from the total gross sales price the amounts required to be deducted under § 201.32(g));

(e) The sales price for each item net of all trade discounts to which the importer is entitled;

(f) The delivery terms (e.g., f.a.b. f.a.s., c.i.f., and c.&f.);

(g) The dollar amounts of any itemized services which are not included in the price of the commodity and for which reimbursement is claimed;

(h) The dollar amount of all delivery services obtained by the supplier of the commodity for the importer's account which are not included in the price of the commodity and for which reimbursement is claimed;

(i) To the extent that the commodity price includes transportation cost as defined in § 201.01(e) or other commodity-related services, a description of such services and the dollar amounts attributable to such services; and,

(j) Unless a Supplier's Certificate covering marine insurance is submitted, the name and address of the supplier of such insurance and the dollar cost thereof.

(ii) Each invoice shall be marked "PAID" by the supplier, or alternatively, the bank may certify by an endorsement on or attachment to the invoice that payment has been made in the amount shown on the invoice.

(3) *Charter party.* A copy (or photostat) of any charter party under which shipment is made. If shipment is made under a consecutive voyage or time charter and the person or organization seeking reimbursement or payment has previously submitted to A.I.D. a copy (or photostat) of said charter party in support of a prior claim for reimbursement or payment, such person or organization may, in lieu of further submission of the charter party, certify to the fact of prior submission.

(4) *Evidence of shipment.* A copy (or photostat) of the bill of lading (ocean, charter party, airway, railway, barge, or truck) or parcel post receipt evidencing shipment from the point of export in the source country or a free port or bonded warehouse. The bill of lading shall indicate the carrier's statement of charges whether or not freight is financed by A.I.D. In lieu of such bill of lading or parcel post receipt, the following evidence of shipment may be submitted:

(i) *For tanker shipments.* (a) A copy (or photostat) of a cablegram from the ship's agent showing loaded cargo figures; and

(b) A certification by the supplier of the commodity that a bill of lading is not immediately available and an undertaking that a copy (or photostat) thereof will be submitted to A.I.D. within 120 days from the date of loading.

(ii) *For certain shipments from the United States.* In the case of any claim for reimbursement by a bank where the commodities are to be shipped from the United States, the bank, to the extent it is able to certify to circumstances described below, may submit its certification as follows:

(a) *Impracticability of furnishing shipping documents.* That the bank has been informed by the approved applicant or supplier that the sale of the commodities is on an f.o.b. or f.a.s. basis and that it is impracticable (as defined in § 201.01(d)) to furnish the required evidence of shipment.

(b) *Receipt of documents.* That the bank has received evidence of the availability of the commodities for shipment pursuant to the form of an inland carrier's bill of lading, a warehouse receipt, a mate's receipt, a master's receipt, a dock receipt, or domestic parcel post receipt, which documents, if in non-negotiable form, must state that the commodity has been consigned to or is being held for a person or organization designated by the approved applicant.

(c) *Delivery of documents.* Whichever of the following is applicable:

(*1*) *Delivery against undertaking.* That the bank has delivered or sent the documents described in subdivision (b) of this § 201.32(a)(4)(ii) to a person or organization designated by the approved applicant and is in possession of a written undertaking by such person or organization either to arrange for transportation from the United States to the cooperating country within ninety days of the date of undertaking and to forward the required evidence of shipment to the bank for submission to A.I.D. or, if unable to arrange shipment, to so notify A.I.D. and, upon the request of A.I.D., to forward to the bank, for submission to A.I.D., a common carrier bill of lading or warehouse receipt in negotiable form relating to the commodity; or

(*2*) *Impossibility of delivery of documents.* That the bank has been unable to deliver the documents described in subdivision (b) of this § 201.32(a)(4)(ii) against the undertaking described in subdivision (*1*) of this § 201.32(a)(4)(ii)(c); that it is holding such documents subject to the instructions of A.I.D., and will forward the same when and if so instructed; and that, if it becomes possible before such instructions are received, it will proceed in accordance with subdivision (*1*) of this § 201.32(a)(4)(ii)(c): *Provided,* however, That if the bank is holding non-negotiable documents and its inability to deliver the documents against the required undertaking is attributable to an action by the United States Government or to other causes beyond its control, the bank may so certify and state that it is holding the documents subject to the instructions of A.I.D. as provided above.

(iii) *For shipments from outside United States.* In the case of shipments, other than by ocean vessel or aircraft, to a cooperating country from an authorized source country or area other than the United States, if the bank furnishes a certificate to the effect that it has been informed by the approved applicant or the supplier that it is impracticable to furnish any of the documents described in this § 201.32(a)(4), such other documents evidencing shipment or evidencing receipt in the cooperating country as are acceptable under good commercial practice, such as railway, barge, or truck bills of lading or importer's receipts.

(5) *Documentation on shipment to a free port or bonded warehouse.* (i) In the case of commodities shipped from a free port or bonded warehouse, the supplier shall

(a) Provide on an attachment to a copy of the invoice a copy of the bill of lading (bearing a notation of the freight cost) covering the shipment of the commodity into the free port or bonded warehouse, or

(b) If such a bill of lading is not available to the supplier, provide the following information and certify to its accuracy to the best of his knowledge and belief: the country or area from which the commodities were shipped to such free port or bonded warehouse; the name and flag of the vessel which transported the commodities from the source country to the free port or bonded warehouse; the cost of the freight on such shipment; and the free port or bonded warehouse to which shipment was made from the source country, or

(c) With respect to commodities which have been commingled in the warehouse in such a way that shipments out of the warehouse cannot be related to particular shipments into the warehouse, the supplier shall certify to the best of his knowledge and belief that a portion of the commodities was transported to the free port or bonded warehouse on U.S. flag carriers, and the quantity for which A.I.D. financing is sought does not exceed that amount.

(ii) In the event a supplier cannot comply with the requirements of subdivision (i) of this § 201.52(a)(6), it will be assumed, in the absence of evidence to the contrary, that the commodity was transported to the free port or bonded warehouse by a vessel under the flag of a country under A.I.D. geographic code 899 other than the United States.

(6) *Supplier's Certificates.* The original and two copies of the Supplier's Certificates specified in the following subdivisions (i) through (iii) of this § 201.52(a)(6). The original of each Supplier's Certificate shall be signed by hand and shall bind the person or organization on whose behalf the execution is made. Any person or organization on whose behalf another purports to sign a Supplier's Certificate which is submitted by such person or organization shall in all respects be bound thereby, notwithstanding that the person so signing acted without express authority.

(i) *Certificate of commodity supplier.* A Supplier's Certificate executed by the supplier of the commodity and of any commodity-related services furnished by the commodity supplier.

(ii) *Certificate of carrier.* A Supplier's Certificate executed by the carrier covering the cost of ocean or air freight.

(iii) *Certificate of supplier of marine insurance.* A Supplier's Certificate executed by the insurer, insurance broker, or underwriter covering the cost of marine insurance when such cost is in excess of fifty dollars.

(b) *Special provision in case of direct reimbursement to borrower/grantee.* In the case of financing by reimbursement directly to a borrower/grantee for payments made by it for procurement, the supplier may, if he desires, submit the Supplier's Certificate prescribed in paragraph (a)(6)(i) of this § 201.52, in duplicate, with Invoice-and-Contract Abstract completed in all applicable respects except as to cost of supplier, information as to agents' commissions, domestic and foreign, and domestic unit price information, accompanied by one copy of such certificate with the Invoice-and-Contract Abstract fully completed in a sealed envelope, addressed to the Controller, A.I.D., Washington, D.C., with the following statement upon its face, signed by the supplier:

The unenveloped certificate that enclosed in this envelope is a copy of an executed Supplier's Certificate covering the item involved, which has been filled in wherever applicable. This envelope contains a document intended only for A.I.D. and is to be opened only by A.I.D.

If such alternative procedure is used, the signer of the Supplier's Certificate shall be deemed to have satisfied the requirement in § 201.52(h) to report all commissions and similar allowances and the requirement of the Supplier's Certificate that he has filled in the applicable portions of the Invoice-and-Contract Abstract.

§ 201.53 Final date for presentation of documents.

(a) *Direct reimbursement.* Prescribed documents shall be presented to A.I.D. by the borrower/grantee no later than the terminal date specified in the implementing document.

(b) *Letter of commitment to bank or special letter of credit.* Prescribed documents shall be presented by the bank to A.I.D. and shall cover (1) payments or negotiations made under letters of credit expiring no later than the expiration date stated in the letter of commitment or the request for the opening of a special letter of credit, or (2) payments to a supplier, the approved applicant, or, at the request of an approved applicant, to a person other than the supplier, made no later than such expiration date.

Subpart C—Price Provisions

§ 201.60 Purpose and applicability of this subpart.

This subpart prescribes rules relating to prices, discounts, commissions, credits, allowances, and other payments. These rules shall be observed in the procurement of commodities and commodity-related services financed under this Part 201. The rules implement and supplement the requirements of the Act relating to prices in such procurement. The general purpose of these rules is to assure the prudent use of A.I.D. funds.

(a) *Statutory price limitations.* (1) Section 604(a) of the Act provides:

Funds made available under this Act may be used for procurement outside the United States * * * only if the price of any commodity produced in bulk is lower than the market price prevailing in the United States at the time of procurement, adjusted for differences in the cost of transportation to destination, quality, and terms of payment.

(2) Section 604(f) of the Act provides:

No funds made available under this Act shall be used for the purchase in bulk of any commodities at prices higher than the market price prevailing in the United States at the time of purchase, adjusted for differences in the cost of transportation to destination, quality, and terms of payment.

(b) *Transactions covered.* The rules and conditions prescribed by this subpart apply to all A.I.D.-financed transactions subject to this Regulation whether or not the commodities are purchased in bulk.

(c) *Compliance.* Compliance with this Subpart C and with any additional price requirement contained in the implementing document shall be a condition to the financing by A.I.D. of procurement transactions under this Part 201. Post-audit of transactions will be made by A.I.D. to determine whether there has been such compliance.

§ 201.61 Meaning of terms in this subpart.

(a) *Time of purchase.* "Time of purchase" means that period encompassing the date the purchase price is fixed during which prices in comparable sales remain substantially constant.

(b) *The date the purchase price is fixed.* "The date the purchase price is fixed" means the date on which the parties agree on the price. If, however, the parties establish the price as of any other date which is subsequent to the date of such agreement and not later than the date of delivery, the term means such other date regardless of whether it precedes, coincides with or follows the legally effective date of the purchase contract.

(c) *Transportation cost.* "Transportation cost" means the cost of all transportation by land, sea or air, from the port of export to the destination in the cooperating country, plus the cost of marine insurance, if any, covering such transportation. (Note: Such costs are financed by A.I.D. only to the extent provided in § 201.13.)

(d) *Purchase price.* "Purchase price" means the total amount which the purchaser agrees to pay or make available to or for the benefit of the supplier (including any person or organization designated by the supplier to receive such payment) for any commodity or commodity-related service which is wholly or partly financed by A.I.D.

(e) *Comparable sale.* "Comparable sale" means any sale of or bona fide offer to sell the same commodity, or (in the absence of such a sale or offer to sell) any sale of or offer to sell a similar commodity which, with respect to the quantity, quality, grade, period of delivery, supply area, terms of sale, or class of purchaser, either

(1) Is not substantially different from the sale being tested to result customarily in a price different from the price in the sale being tested; or

(2) Can be related to the sale being tested through application of a customary price differential.

(f) *Comparable export sale.* "Comparable export sale" means any "comparable sale" in export transactions.

(g) *Comparable domestic sale.* "Comparable domestic sale" means any "comparable sale" not in export transactions.

(h) *Export differential.* "Export differential" means the customary difference in price between domestic sales and otherwise comparable export sales.

(i) *Class of purchaser.* "Class of purchaser" means any group of purchasers which is separately identifiable and which is distinguishable from other purchasers on the basis of quantity purchased, distribution function or established trade practice.

(j) *Period of delivery.* "Period of delivery" means the length of time between the date of the purchase contract and the date by which delivery is to be completed.

(k) *Supply area.* "Supply area" means

(1) The source country; or

(2) If the commodity is customarily sold at different prices (exclusive of transportation costs) from different geographical areas within a source country, the specific geographical area within the source country from which the commodity is shipped to the cooperating country.

(l) *Similar commodity.* "Similar commodity" means a commodity which

(1) Is functionally interchangeable with the commodity in the sale being tested; and

(2) Affords the purchaser substantially equivalent serviceability.

(m) *Producer.* "Producer" means any person who grows, mines, manufactures, processes, or assembles a commodity in the form in which it is exported.

§ 201.62 Responsibilities of borrower/grantee and of supplier.

(a) *Responsibilities of borrower/grantee and importer.* The borrower/grantee shall ensure that the importer

(1) Procures in accordance with the conditions set forth in § 201.34, and in either § 201.22 or § 201.23, whichever is applicable, and

(2) Except as provided otherwise in § 201.22(d), pays no more than the lowest available competitive price, including transportation cost, for the commodity.

(b) *Responsibility of supplier.* In accordance with the provisions contained in the Supplier's Certificate which the supplier executes in order to receive payment, the supplier is responsible for compliance with the provisions of this Subpart G other than paragraph (a) of this § 201.62.

§ 201.63 Maximum prices for commodities.

(a) *U.S. prevailing market price—U.S. source.* The purchase price for a commodity the source of which is the United States shall not exceed the market price prevailing in comparable export sales in the United States at the time of purchase adjusted for differences in the transportation cost: *Provided, however,* That if there are no such comparable export sales, then the purchase price, excluding transportation cost, may not exceed the market price prevailing in comparable domestic sales in the United States at the time of purchase, adjusted upward or downward by the appropriate export differential.

(b) *U.S. prevailing market price—non-U.S. source.* The purchase price, including transportation cost, for a commodity the source of which is not the United States shall be lower than the market price prevailing in comparable export sales in the United States at the time of purchase including transportation cost: *Provided, however,* That if there are no such comparable export sales in the United States, then the purchase price from the source outside the United States, including transportation cost, must be lower than the market price prevailing in comparable domestic sales in the United States at the time of purchase, adjusted upward or downward by the appropriate export differential and transportation cost.

(c) *Supplier's comparable export price—U.S. and non-U.S. sources.* (1) The purchase price, excluding transportation cost, shall not exceed prices generally charged by the supplier in comparable export sales from the source country at the time of purchase.

(2) The requirement in subparagraph (1) of this § 201.63(c) shall not apply to the purchase price

(i) In any sale under formal competitive bid procedures; or

(ii) In any sale of a commodity generally traded on an organized commodity exchange.

(3) "Comparable export sales" for the purpose of this § 201.63(c) shall not include sales

(i) Under formal competitive bid procedures; or

(ii) Of a commodity by a supplier to affiliates if the supplier as a general practice sells the commodity to affiliates at prices lower than the prices he charges to non-affiliates.

(d) *Source country prevailing market price—non-U.S. source.* The purchase price, excluding transportation cost, shall not exceed the market price prevailing in the source country in comparable export sales at the time of purchase: *Provided, however,* That, if there are no such comparable export sales, then the purchase price, excluding transportation cost, shall not exceed the market price prevailing in comparable domestic sales in the source country at the time of purchase, adjusted upward or downward by the appropriate export differential.

(e) *Price test in the absence of a comparable sale at the time of purchase—U.S. and non-U.S. sources.*—(1) *Sale by a supplier who is not the producer.* The purchase price shall not exceed the sum of

(i) The supplier's cost of acquisition; and

(ii) The customary mark-up of the supplier

(a) In comparable sales other than at the time of purchase; or

(b) If no comparable sale at any time can be found, in the most nearly similar sale of the most nearly similar commodity by the supplier or his competitors.

(2) *Sale by a supplier who is the producer.* The purchase price shall not exceed a price established in accordance with the customary pricing practices of the supplier for other products of the same general class as the commodity sold.

(f) *Additional rule for sugar.* In addition to being subject to the other price limitations contained in this section, the purchase price for sugar shall not exceed the world price as derived from the daily market quotations on the New York Sugar Exchange for No. 8 Contract spot, f.a.b. and stowed, adjusted for differences in quality, bagging, transportation cost, and other appropriate considerations.

(g) *Additional rule for crude oil, petroleum fuels, and lubricants.* In addition to being subject to the other price limitations of this § 201.63, the purchase price, including transportation cost, for crude oil, petroleum fuel, or lubricants procured from a non-U.S. source shall not exceed the prevailing price, including transportation cost, at which such commodity is available at the time of purchase in quantities similar to the contract amount from the same or from any other eligible source for otherwise comparable export sales. This limitation shall not apply to the purchase price of such a commodity procured under formal competitive bid procedures. "Comparable export sales" for the purpose of this § 201.63(g) shall not include sales under formal competitive bid procedures.

§ 201.64 Application of the price rules to commodities.

(a) *Calculation of commodity prices on a common basis.* In testing whether the purchase price of a commodity exceeds the price in comparable export sales or in comparable domestic sales, as applicable under § 201.63 (a), (c), (d), and (e), it is necessary to ensure that the price being tested as well as the prices being used as a test or measurement are calculated on the basis of delivery alongside or on board the vessel or other export conveyance. Such prices will include, therefore, in addition to the price of the commodity at an internal point in the source country, transportation from that point to the port of export in the source country, and to the extent not already included in the price at the internal point, inspection, export packing, forwarder's fees at customary rates, the cost of placing the commodities on board the vessel or export conveyance (unless this cost is covered in the export freight), and other necessary costs customary in the trade.

(b) *Calculation of commodity prices which involve transportation costs.* (1) In testing a purchase price which includes transportation cost (customarily known as a c.&f. or c.i.f. price) for compliance with the requirements of § 201.63 (a), (c), (d) and (e), A.I.D. will subtract from such price transportation cost as calculated by reference to the freight rate (for the type and size of vessel on which the commodity was shipped) prevailing on the date the purchase price is fixed. In the absence of evidence to the contrary, the actual transportation cost paid by the supplier shall be presumed to be the transportation cost calculated in accordance with the formula contained in the foregoing sentence.

(2) In testing a purchase price involving transportation cost for compliance with § 201.63 and § 201.63 (b), (f), and (g), the test or measurement prices shall be

(i) Prices based upon transportation by a U.S. flag carrier if the price tested

involves transportation by a U.S. flag carrier; or

(ii) Price based upon transportation by either a U.S. flag carrier or a foreign flag carrier, whichever is lower, if the price listed involves transportation by a foreign flag carrier.

(c) *Calculation of amount eligible for financing when shipment is out of a free port or bonded warehouse.* In the case of a shipment from a free port or bonded warehouse, A.I.D. will not finance any portion of the cost of the commodity, delivered to the country of destination, which exceeds the eligible price of the commodity, f.o.b. or f.a.s. source/country, plus any transportation cost which can be documented in accordance with § 201.53(a)(5)(i) as having been incurred on a U.S. flag transportation medium.

(d) *Determination of prevailing market price.* In the determination of any prevailing market price for any commodity, relevant published and other price information will be considered.

§ 201.65 Rules governing discounts, commissions and similar allowances.

(a) *Commissions to sales agents.* (1) Unless prohibited by the implementing document, a commission paid to a sales agent of the supplier shall be eligible for financing under this Regulation if the agent has made a contribution toward securing the purchase contract for the supplier or is engaged on a continuing basis in securing similar contracts for the supplier. A commission shall not exceed the amount which the supplier customarily pays in connection with similar transactions or the amounts which is customary in the trade.

(2) No person (including a dealer, distributor or other sales representative of the supplier) shall be considered a sales agent of the supplier in any transaction in which such person is the importer.

(b) *Allowances to importers.* All payments, credits or allowances of any kind, paid or to be paid by the supplier to or for the benefit of the importer in connection with any purchase subject to this Part 201 shall be deemed discounts to the importer and shall not be eligible for A.I.D. financing.

(c) *Allowances to purchasing agent.* Every payment, credit, commission, or allowance of any kind paid or to be paid by the supplier to or for the benefit of a purchasing agent, other agent or representative of an importer in connection with any purchase subject to this Part 201 shall be deemed a discount to the importer and shall be ineligible for A.I.D. financing even though the purchasing agent, other agent or representative may also have an agreement with a supplier to represent the supplier. Any entity affiliated with the importer by ownership or management also shall be deemed a representative of the importer and shall not be considered an agent or representative of the supplier.

(d) *Cross commissions on commodity transactions.* In connection with a sale by a supplier to his established agent in the cooperating country, no commission or other allowance paid to a third party shall be eligible for A.I.D. financing.

(e) *Brokerage commissions.* In connection with ocean freight services A.I.D. will finance brokerage commissions if

(1) The total commissions do not exceed two and one-half percent of the ocean freight charge;

(2) The commissions are payable to U.S. firms; and

(3) The names of all persons receiving such commissions appear on the face of the charter party.

(f) *Address commissions.* An address commission to or for the benefit of a charterer shall be deemed a discount on the stated freight rate or freight charge which the supplier of transportation services shall deduct from the cost of transportation financed by A.I.D. If the supplier of the commodity is the charterer, he shall refund to A.I.D. any address commission received by him. If the supplier of the commodity is not the charterer, the borrower/grantee shall be responsible for making a refund to A.I.D. of any such commissions received by the charterer.

(g) *Required deductions from invoice amount.* To arrive at the net amount eligible for A.I.D. financing, there shall be deducted from the gross amount of the supplier's invoice submitted under § 201.53(a)(2)

(1) All trade discounts to which the importer is entitled, and

(2) All payments, credits, commissions and other allowances to the extent they are ineligible for financing under this § 201.65.

(h) *Report of commissions and similar allowances.* All payments, credits, commissions and similar allowances, whether or not eligible for financing under this Regulation, made by the supplier in connection with A.I.D.-financed sales to or for the benefit of the supplier's agent, the importer, or the importer's agent shall be fully reported in the Supplier's Certificate required under § 201.53(a)(6).

§ 201.66 Side payments.

Any payment which an importer makes to a supplier, whether or not indicated on the supplier's invoice and whether or not financed by A.I.D., in connection with an A.I.D.-financed transaction shall be disclosed by the supplier on the Supplier's Certificate and shall be considered as part of the actual purchase price in applying the rules of this Subpart G.

§ 201.67 Maximum freight charges.

(a) *Ocean freight rates*—(1) *Similar shipments.* "Similar shipments" means shipments which are similar with respect to type of commodity, commodity rate classification, quantity, vessel flag category, choice of ports, and other pertinent factors. In determining whether shipments are similar, no effect shall be given to the identity of the shipper or to the circumstance that the shipments is or is not financed by the Government of the United States.

(2) *Maximum charter rates.* (i) A.I.D. will not finance ocean freight under any charter which has not been submitted in and received prior approval by AID/W. A.I.D. will not approve a charter if the freight rate exceeds

(a) The rate prevailing for similar shipments;

(b) The lowest rate charged by the carrier for similar shipments on the same voyage; or

(c) The maximum rate determined by the Maritime Administration in connection with the Cargo Preference Act (46 U.S.C. 1241).

(ii) In determining the rate prevailing for similar shipments, recognized sources of charter market rate information will be consulted and, if necessary, will be supplemented by other information which contributes to a realistic determination of the prevailing charter rate.

(3) *Effect of A.I.D. approval of a charter.* A.I.D. prior approval of a charter shall be confirmed by A.I.D. in writing and shall then be final except in cases where the freight rate exceeds the lowest rate charged by the supplier for similar shipments on the same voyage or where A.I.D.'s prior approval is based on false or misleading representations made to A.I.D. by the charterer or ocean carrier.

(4) *Maximum liner rates.* A.I.D. will not finance ocean freight for a cargo liner shipment at a rate which exceeds

(i) The conference contract rate or the conference non-contract rate, whichever is lower;

(ii) The rate named in any other applicable tariff or other rate listing on file at the Federal Maritime Commission; or

(iii) The lowest rate charged by the carrier for similar shipments on the same voyage.

(5) *Despatch.* (i) The borrower/grantee, or the supplier with respect to despatch earned by the supplier, shall be responsible for refunding to A.I.D. all despatch earned

(a) At the port of unloading on c.i.f. or c.&f. shipments, or

(b) At the port of loading or unloading on f.o.b. or f.a.s. shipments, to the extent that despatch exceeds demurrage incurred on the same voyage.

(ii) Refunds of despatch, supported by the vessel's signed lay time statement(s), must be transmitted to the Controller, A.I.D., Washington, D.C., within ninety days after date of discharge of the cargo on which the despatch was earned.

(b) *Air freight rates.* A.I.D. will not finance air freight which exceeds the applicable rate on file at the Civil Aeronautics Board, Washington, D.C.

§ 201.68 Maximum prices for commodity-related services.

The price for an A.I.D.-financed commodity-related service other than ocean or air transportation shall not exceed (a) the prevailing price, if any, for the same or similar services; or (b) the price paid to the supplier under similar circumstances by other customers.

§ 201.69 Commodity price subject to escalation.

If a purchase contract contains a price escalation clause, A.I.D. will finance

(a) The purchase price of the commodity before operation of the price escalation clause if at the time of purchase such price does not exceed the applicable

price limitations contained in this subpart; and

(b) That portion of the commodity price attributable to the operation of the price escalation clause if such clause

(1) Is applied to a base price which qualifies for A.I.D.-financing under paragraph (a) of this § 201.69;

(2) Uses a formula based upon variations in a cost factor which is reasonably related to the price of the commodity subject to escalation and is readily determinable;

(3) Provides for downward as well as upward adjustment of the price; and

(4) Accords with recognized trade practice.

Subpart H—Rights and Responsibilities of Banks

§ 201.70 Purpose.

This subpart sets forth the rights and responsibilities of banks with regard to reimbursement under a letter of commitment or a special letter of credit opened pursuant to an A.I.D. request. Banks will not be held responsible for the requirements of Subparts B, C, D, E (excluding § 201.44(a)(1)), and G of this Part 201 except insofar as provisions of these subparts are included in this subpart, or in a letter of commitment or a request for the opening of a special letter of credit issued by A.I.D. to a bank.

§ 201.71 Terms of letters of credit.

(a) *Letters of credit under letters of commitment.* Any letter of credit issued, confirmed or advised under an A.I.D. letter of commitment and any agreement relating to such letter of credit or to instructions for payment issued by an approved applicant may not be inconsistent with or contrary to the terms of the letter of commitment. In particular, the description of commodities or services in any such letter of credit or agreement may not be inconsistent with the description and A.I.D. commodity code set forth in the letter of commitment. Any such letter of credit or agreement may be modified or extended at any time in such manner and to such extent as is acceptable to the approved applicant and the bank; *Provided*, That such modification or extension may not be inconsistent with or contrary to the terms of the letter of commitment. In the case of any inconsistency or conflict between the terms and conditions of the letter of commitment and the instructions of the approved applicant, the terms and conditions of the letter of commitment shall control.

(b) *Special letters of credit.* Any special letter of credit or subsidiary letter of credit issued thereunder at the instruction of the beneficiary of such special letter of credit and any agreement relating to such special letter of credit or subsidiary letter of credit or to instructions for payment issued by the beneficiary, or any party designated by him, must not be inconsistent with or contrary to the terms of the A.I.D. request for the opening of a special letter of credit. In the case of any inconsistency or conflict between the terms and conditions of such request and instructions of the beneficiary, or any party designated by him, the terms and conditions of such request shall control.

§ 201.72 Making payments.

(a) *Collection of documents.* The bank shall be responsible for obtaining the documents specified in Subpart F of this Part 201 and in the letter of commitment or the request for the opening of a special letter of credit when making payment under a letter of credit or pursuant to instructions of an approved applicant.

(b) *Examination of documents other than Supplier's Certificates.* The bank shall examine the documents (other than Supplier's Certificates) to be submitted to A.I.D. in accordance with good commercial practice to determine whether such documents comply with the requirements of subparagraphs (1) through (7) hereof in the following particulars, and no other.

(1) *Shipment.* The documents submitted as evidence of the shipment of commodities under § 201.53(a)(4) shall be dated within the shipping period, if any, specified in the letter of commitment or the request for the opening of a special letter of credit.

(2) *Source of commodities.* The documents submitted in connection with the claim for reimbursement or commodities may not indicate that the source of the commodities is inconsistent with the A.I.D. geographic code designation contained in the letter of commitment or the request for the opening of a special letter of credit.

(3) *Destination.* The documents submitted shall indicate that the destination of the commodities, by shipment, trans-shipment, or reshipment, is the cooperating country named in the letter of commitment or the request for the opening of a special letter of credit.

(4) *Description.* The documents shall describe and identify the commodities or services in a manner which, according to good commercial practice, is not inconsistent with the description contained in the letter of credit or payment instructions issued under a letter of commitment or a request for the opening of a special letter of credit. The bank shall not be required to determine whether the supplier's invoice meets the detailed requirements of § 201.53(a)(3)(i) or whether the carrier statement of charges is indicated on the bill of lading.

(5) *Discounts and purchasing agent's commissions.* If the documents disclose that the invoice price includes either discounts or commissions payable to purchasing agents, the bank shall not make payment of such discounts and commissions. In the absence of such information, however, the bank shall not be required to make independent inquiry as to whether the invoice price includes such items.

(6) *Certifications.* Each supplier's invoice presented for payment shall contain such other certifications as may be required in the letter of commitment or the request for the opening of a special letter of credit. The bank shall accept only certifications which, to the best of its knowledge and belief, have been signed by hand.

(7) *Other requirements.* The documents submitted shall contain such other information as required by the letter of commitment or the request for the opening of a special letter of credit except that the bank shall have responsibility in this regard only to the extent specifically indicated in the letter of commitment or such request.

(c) *Acceptance of Supplier's Certificates.* A bank shall not accept the original of the Supplier's Certificates to be submitted to A.I.D. unless, to the bank's best knowledge and belief, such original has been signed by hand.

§ 201.73 Limitations on the responsibilities of banks.

The following general limitations on the responsibilities of banks issuing, advising, or confirming letters of credit and making payments under letters of credit or otherwise, shall apply.

(a) *Sufficiency and completeness of documents.* Any document, including the Supplier's Certificate, submitted by a bank to A.I.D. in support of a claim for reimbursement, shall be sufficient if it purports to be the sort required to be delivered and if it has been accepted by the bank in the ordinary course of business in good faith. Except as may be required in discharge of its responsibilities under § 201.72 (b) and (c), the bank's right of reimbursement shall not be affected by the fact that any document required to be submitted by it is incomplete or may indicate noncompliance with any provision of this Part 201.

(b) *Reimbursement right notwithstanding deficiencies in Supplier's Certificate Invoice-and-Contract Abstract.* The right of reimbursement for payments made by the bank will not be affected by the fact that the Invoice-and-Contract Abstract in the Supplier's Certificate may be incomplete, or may indicate noncompliance with any provision of this Part 201, the letter of commitment, the request for the opening of a special letter of credit, or any other implementing document, or may be inconsistent with other documents required for reimbursement.

(c) *Non-responsibility of bank for truth or accuracy of statements or certifications.* The bank shall not be responsible for the truth or accuracy of any information or statement contained in any Supplier's Certificate or any other document or certification to be submitted by it to A.I.D., notwithstanding any knowledge or information in the actual or constructive possession of the bank to the contrary. The bank shall not be obligated to look beyond the documents, including any certification endorsed thereon, to be submitted by it or to make any independent investigation as to the truth or accuracy of any information or statement contained therein.

(d) *Protection of bank making payment.* Acceptance by the bank of any document in the ordinary course of business in good faith as being a genuine and valid document and sufficient in the premises, and the delivery thereof to A.I.D., shall constitute full compliance

by the bank with any provision of this Part 201, the letter of commitment or the request for the opening of a special letter of credit requiring delivery of a document of the sort that the document actually so delivered purports to be. The bank shall be entitled to receive and retain reimbursement of the amount of all payments made by it against documents so accepted, notwithstanding that such payments may be made in connection with a purchase in excess of the price calculated in accordance with the applicable provisions of Subpart C.

(e) *Payment to third persons.* The bank's right of reimbursement shall not be affected by the fact that payment is made to the approved applicant or the beneficiary of a special letter of credit or at the request of the approved applicant or such beneficiary to a person other than the supplier under the contract to which such payment relates, if the bank has complied with all other requirements of the letter of commitment or the request for the opening of a special letter of credit and has satisfied itself in good faith that the person to whom it makes payment has, in turn, made payment to the supplier.

(f) *Bank procedures with regard to certain suppliers.* In the event a bank receives written advice from A.I.D. concerning special conditions which are applicable to transactions of particular suppliers, such bank will use reasonable care to maintain procedures designed to ensure that accommodations thereafter furnished by it with respect to such suppliers by means of the issuance, confirmation, advising or transfer of letters of credit, or the making of payments not under letters of credit shall reflect such special conditions. While banks are expected to comply with the foregoing obligation, a bank which has used reasonable care to establish and maintain such procedures will not be responsible for any inadvertent furnishing of any such accommodation not containing applicable special conditions or the making of payment thereunder. For the purpose of ascertaining whether the supplier is a person or organization subject to an A.I.D. advice concerning special conditions applicable to its transactions under this paragraph (f), a bank, in making payment under a letter of credit or otherwise, may consider as supplier the person or organization issuing the invoice.

(g) *Provision of implementing documents.* A bank shall not be responsible for compliance with any provision of an implementing document other than a letter of commitment or a request for the opening of a special letter of credit.

§ 201.74 Additional documents for A.I.D.

In addition to the documents required for reimbursement a bank shall retain in its files for a period of at least five years and shall make available to A.I.D. promptly upon request a copy of any of the following documents which may pertain to an A.I.D.-financed transaction:

(a) Each letter of credit issued, confirmed, or advised by it, together with any extension or modification thereof;

(b) Payment instructions received from the approved applicant;

(c) Each application and agreement relating to such letter of credit or instructions for payment, together with any extension or modification thereof;

(d) A detailed advice of the interest, commissions, expenses, or other items charged by it in connection with each such letter of credit or payment instructions.

§ 201.75 Rights of banks.

(a) *Termination or modification.* If A.I.D. directs that the delivery of commodities be terminated, orders that title to commodities be vested in it, or modifies any implementing document concerning the disposition of documents, A.I.D. shall give written notice thereof to the banks holding applicable letters of commitment or requests for the opening of special letters of credit and shall instruct each bank with regard to the disposition of documents. Each such bank shall be relieved of any liability whatsoever to the approved applicant for anything done or omitted to be done under instruction of A.I.D. Notwithstanding the foregoing, a bank shall comply with the instructions of A.I.D. only to the extent that it may do so without impairing or affecting any irrevocable obligation to any person or organization except an approved applicant, and in the event the bank shall incur any costs, expenses, or liabilities, including any liability to the approved applicant, it shall be repaid and reimbursed by A.I.D. in respect thereof.

(b) *Reimbursement under certain banking certificates.* In the event a bank shall certify to A.I.D. under § 201.53(a)(4)(ii)(c)(2) that it is unable to deliver shipping documents, the bank shall be entitled to reimbursement from A.I.D. for all costs, expenses, and liabilities paid or incurred by it as a result of following the instructions of A.I.D. or of holding documents pending receipt of such instructions.

Subpart I—Rights and Remedies of A.I.D., Waiver Authority, and Transitory Provisions

§ 201.80 Purpose.

This subpart sets forth certain A.I.D. rights and remedies against borrower/grantees and suppliers, and prescribes certain general provisions relating to the waiver by A.I.D. of this Part 201, the continuation in effect of certain prior issuances and the effective date of this Part 201.

§ 201.81 Rights of A.I.D. against borrower/grantees.

If any transaction financed hereunder violates the requirements of this Part 201 or any United States statute or any rule or regulation of A.I.D. promulgated under any such statute, A.I.D. may require the borrower/grantee to refund the amounts A.I.D. determines are attributable to such violation and may exercise any right of acceleration or termination contained in the implementing document. The borrower/grantee shall be deemed to have agreed to make such refund or accelerated payment promptly upon request by A.I.D. and shall be deemed to have consented to any modification of the implementing document determined by A.I.D. to be necessary to reflect any such refund or acceleration.

§ 201.82 Rights of A.I.D. against suppliers.

Without limiting the responsibility of the borrower/grantee or other parties, A.I.D. may require an appropriate refund to it by a supplier under any transaction which violates the requirements of this Regulation, whenever in A.I.D.'s opinion the failure of the supplier to comply with the rules and other requirements of this Part 201 has contributed to such violation.

§ 201.83 No waiver of alternative rights or remedies by A.I.D.

No right reserved to A.I.D. in this subpart to seek a refund from a borrower/grantee, and no exercise of such right, whether or not successful, shall in any way limit or affect, under the doctrine of the election of remedies or otherwise, A.I.D.'s rights against a supplier under this subpart or under the laws of the United States, or of any other country or political subdivision thereof, nor shall any right or remedy herein reserved to A.I.D. against a supplier in any way derogate from or otherwise limit any other rights or remedies which may accrue to A.I.D. under such laws.

§ 201.84 Limitation on period for making refund requests.

A.I.D. will endeavor, but shall not be bound, to make any requests for refunds from a borrower/grantee within five years from the date of the last disbursement of A.I.D. funds for the transaction to which such request relates.

§ 201.85 Waiver and amendment authority.

A.I.D. may waive, withdraw, or amend at any time any or all of the provisions of this Part 201.

§ 201.86 Continuation in effect of certain prior issuances.

The following documents, if issued or executed by A.I.D. or any predecessor agency or corporation prior to the effective date of this Part 201, will continue in effect, subject to all the terms and conditions of such documents and, to the extent applicable, all the terms and conditions of Regulation 1 as in effect on the date of the issuance of such documents: Project agreements, procurement authorizations and project implementation orders, United States Government agency purchase requisitions, loan agreements and implementation letters, letters of commitment and letters of notification to banks, requests for the opening of a special letter of credit and letters of commitment to suppliers, Authorizations, bank contracts, letters of guaranty to banks or suppliers issued by A.I.D. or any predecessor agency or corporation prior to the effective date of this Part 201 will continue in effect in accordance with their terms. Amendments to any of the above

documents may continue to be made in accordance with the procedures in effect prior to the effective date of this Part 201.

§ 201.87 Effective date and transitory provision.

This Part 201 shall become effective on November 1, 1964 and, except as provided in § 201.84, shall revoke and supersede in its entirety A.I.D. Regulation 1, as in effect prior to that date.

Dated: September 2, 1964.

David E. Bell,
Administrator.

APPENDIX A—SUPPLIER'S CERTIFICATE AND AGREEMENT WITH THE AGENCY FOR INTERNATIONAL DEVELOPMENT (FORM AID-281)

The supplier hereby acknowledges notice that the sum indicated on the accompanying invoice as claimed to be due and owing under the terms of the contract described on the reverse hereof (hereinafter referred to as "said contract") is to be paid, in whole or in part, out of funds made available by the United States under the Foreign Assistance Act of 1961, as amended, and that such payment is subject to Regulation 1 of the Agency for International Development (A.I.D.), as in effect on the date hereof (22 CFR Part 201). In consideration of the receipt of such sum, the supplier agrees with and certifies to A.I.D. as follows:

1. The undersigned is the supplier of the commodities or commodity-related services indicated in the Invoice-and-Contract Abstract on the reverse hereof, is entitled under said contract to the payment of the sum claimed, and is executing this Certificate and Agreement for the purpose of obtaining such payment from funds made available by the United States as described above.

2. The supplier will, upon the request of A.I.D., promptly make refund to A.I.D. of any amount by which the purchase price exceeds the maximum price permitted under the provisions of subpart G of A.I.D. Regulation 1 other than § 201.63(a).

3. The supplier will, upon the request of A.I.D., promptly make appropriate refund to A.I.D. in the event of

(a) his nonperformance, in whole or in part, under said contract, or

(b) any breach by him of any of his undertakings in this Certificate and Agreement, or

(c) any false certification or representation made by him in this Certificate and Agreement or in the Invoice-and-Contract Abstract on the reverse hereof in regard to the transaction indicated thereon.

4. The supplier will promptly pay to A.I.D. (Office of the Controller, A.I.D., Washington, D.C., 20523) any adjustment refunds, credits, or allowances payable to or for the account of the importer arising out of the terms of the said contract or the customs of the trade.

5. On the basis of information from such sources as are available to the supplier and to the best of his information and belief, any commodity supplied under said contract meets the requirements of § 201.11(b) of A.I.D. Regulation 1 as to source, country where mined, grown, or produced, and limitation on components.

6. The supplier or his agent has not entered into any agreement or understanding to obtain said contract [illegible] and has not given or promised and will not give or promise any gratuity, "kickback", or any other payment or benefit whatever in connection with said transaction or any series of transactions of which said transaction is a part, other than those payments or benefits referred to in paragraphs 7 and 8 and indicated on the reverse hereof. Any commissions paid or to be paid in connection with said transaction are shown on the reverse hereof in blocks 29 through 32.

7. If the supplier is the producer, manufacturer or processor of the commodity, said contract is not a cost-plus-percentage-of-cost contract.

8. On the basis of information from such sources as are available to the supplier and to the best of his information and belief, the purchase price is no higher than the maximum price prohibited under each of the requirements of subpart G of A.I.D. Regulation 1, relating to maximum prices other than § 201.63(a).

9. The amount shown on the reverse hereof in block 2 is net of all credits, allowances, and discounts granted and payments made, by the supplier or his agent to or for the account of the importer, including all discounts and payments for quantity purchases and prompt payment customarily allowed other customers under similar circumstances.

11. The supplier will for a period of not less than five (5) years after the date hereof maintain all business records and other documents which bear on his compliance with any of the undertakings and certifications herein and will at any time requested by A.I.D. make such records and documents available to A.I.D. for examination.

12. The supplier has complied with the provisions contained and referred to in subpart D of A.I.D. Regulation 1. If the supplier has been informed by A.I.D. of a requirement for submitting to A.I.D. for prior review proposed sales to be financed through funds made available by A.I.D., the supplier has made such submission, has been notified by A.I.D. of the results of such review, and has complied with all conditions and requirements specified in such notification.

13. The supplier has filled in the applicable portions of the Invoice-and-Contract Abstract on the reverse hereof, certifies to the correctness of the information shown therein, and will upon the request of A.I.D. promptly furnish to A.I.D. such additional information in such form as A.I.D. may request concerning the purchase price, the cost to the supplier of the commodities and/or commodity-related services involved, or any other facts, data, or business records relating to the supplier's compliance with his undertakings and certifications in this Supplier's Certificate and Agreement.

14. The agreement incorporated herein shall be deemed to be a contract made under the laws of the District of Columbia, U.S.A., and shall be governed by and construed in accordance with such laws.

(Date) (Name of Supplier (see instructions))

(Signature and title of official authorized to sign for supplier)

Place executed (City, State, country)

NOTES: (a) Any amendments of, or additions to, the printed provisions of this Supplier's Certificate and Agreement are improper and will not be considered a part hereof. (b) False statements herein are punishable by United States law. (c) The word "Copy" must be written after signature on all signed copies other than the original.

Invoice-and-Contract Abstract

Invoice information

1. A.I.D. number	2. Invoice amount after discount	3. Source of shipment	4. Date where made	5. Gross long tons

6. Vessel name	Bulk	Bale	Tanker	7. Flag	8. Port of exit	9. Date—bill of lading		
						Month	Day	Year

10. Commodity or service—in English	11. A.I.D. code	12. Invoice date	13. Quantity	14. Quantity unit	15. Unit price	16. Shipping terms

17. Supplier's name and address	18. Class of supplier (check one) (for U.S. suppliers only)	19. Importer's name and address
	Small business concern	
	Not small business concern	

Information as to commissions, credits, allowances, similar payments, and fee payments

20. Nature of recipients	21. Addressee	22. Amount paid or to be paid	
		Included in invoice	Not included in invoice

Contract and price information

23. Contract date			24. Total contract quantity	25. Specify how terms and amount that will accrue to any difference between contract and invoice price
Month	Day	Year		

INSTRUCTIONS (From AID-281, 7-2-64)

THIS FORM MUST BE COMPLETED IN THE ENGLISH LANGUAGE ONLY AND ALL QUANTITIES OF MONEY ARE TO BE EXPRESSED IN U.S. DOLLARS

Obtaining form. The forms (as well as copies of A.I.D. Regulation 1 referred to in this form) may be obtained in limited quantities from banks holding A.I.D. letters of commitment, regional offices of the Department of Commerce, or the Distribution Section, Agency for International Development, Washington, D.C., 20523. Forms may be reproduced provided the reproduction is identical in content, size, color, and format.

Invitation number—Block 1: Insert A.I.D. implementing document number furnished in the letter of credit or importer's instructions.

Block 2: The amount shown in block 2 is the net amount for which the supplier seeks payment. It must not include any credit, discount, commission, or allowance to or for the account of the importer or his agent. Commissions paid or to be paid in connection with the transaction covered by this form to agents of supplier which are included in the amount shown in block 2 must be detailed in blocks 20 through 22.

Block 3: Show the country of source as defined in § 201.01 of A.I.D. Regulation 1.

Block 4: This block is to be completed only for commodities made in the United States. Enter the State in which the commodity was mined, grown, or produced, if known.

Block 5: Show the bill of lading weight rounded to the nearest whole long ton (2,240 lbs. or 40 cubic feet to the ton). *Blocks 6 through 9:* Use the numerical designation for month, day, and year, in the order. Where the supplier does not arrange for ocean shipment, these blocks may remain blank.

Block 10: Insert the description of the commodities or services. For multiple-item invoices, insert the descriptive words commonly employed within the trade. *Block 11:* Insert the A.I.D. 5- or 6-digit commodity code if known.

Blocks 12 through 15: Insert the commodity invoice data, freight rate, or insurance rate, as applicable. If there is insufficient room, as in the case of multiple-item invoices, the information may be furnished (a) on an attached listing, (b) in block 20, or (c) by means of an additional copy of the invoice attached to this form. In any of these instances, appropriate reference should be made in blocks 12 through 15 as to the method by which the information is furnished, e.g., "See attached listing".

Block 16: Show the shipping terms, i.e., if a commodity supplier, state "FOB [or FAS] at ....." or "CIF [or C&F] to ....."; if a supplier of ocean transportation, state "Chartered" or "Prepaid". *Block 17:* Enter the supplier's name and address. *Block 18:* If a U.S. supplier, check the appropriate box to indicate whether or not the supplier is a small business concern. Generally, a small business concern is a concern that (a) is not dominant in its field of operations and, with its affiliates, employs fewer than 250 employees, or (b) is certified as a small business concern by the Small Business Administration. (Code of Federal Regulations, Title 13, Part 121, as amended, contains definitions.) *Block 19:* Enter the importer's name and address.

INFORMATION AS TO COMMISSIONS, GRATUITIES, ALLOWANCES, DOMINANT PATRONAGE, AND OTHER PAYMENTS—*Blocks 20 through 22:* Enter in these blocks pertinent information with reference to (a) all payments, gratuities, commissions, and similar allowances paid or to be paid by the supplier to or for the benefit of his agent, the importer, or the importer's agent as required by § 201.65(b) of A.I.D. Regulation 1, and (b) any side payments, not shown on the invoice, made or to be made by the importer to the supplier, in connection with the transaction, as required by § 201.65 of A.I.D. Regulation 1. In block 22 indicate whether or not the amount is included in the invoice amount reported in block 2 by entering the amount of such payment opposite the related entry in the appropriate column "Included in Invoice" or "Not Included in Invoice". If there is insufficient room to furnish the information required in blocks 20 through 22, the blocks may be noted "Continued" or "See attached listing" and the required information shown in block 25 or furnished on a listing attached to the form. If no commissions, gratuities, allowances, similar payments, and side payments are involved, insert "NONE" in block 20. *Contract and price information.* Contracts need not be submitted to A.I.D. unless specifically requested. In the case of ocean freight, however, charter parties, if any, are to be included in the reimbursement documents. *Block 23:* Enter the date of the contract. *Block 24:* Enter the total contract amount. *Block 25:* Use this block to explain differences, if any, between shipping terms, quantity, and unit price as stated in the contract and as invoiced. The block may also be used to furnish explanation of, or additional information in connection with, any entries on the form.

ATTACHMENT B—INSTRUCTIONS FOR STANDARD OR PREFERRED PROCUREMENT

In general, the minimum notification requirements specified in subparagraphs (3) and (5) of § 201.24(a) of A.I.D. Regulation 1 must be observed by the importer in all A.I.D.-financed procurement other than by formal competitive bids. Exceptions from these requirements are set forth in § 201.24 (b) "Exemption for small value procurement" and § 201.24(c) "Waiver provisions" of the regulation.

These minimum notification requirements are as follows:

The importer must submit to the Office of Small Business (OSB), A.I.D., a notice of proposed procurement. Until forty-five (45) days after its expected arrival there, the importer or his agent may not accept any offer or place any order, or agree to accept any offer or to place any order. The OSB may require a waiting period longer than forty-five (45) days or, upon application of the importer, authorize a shorter period. Except when exemption is by cablegram, three copies are to be submitted by registered mail to the OSB.

Cablegrams: OSBAID, Washington, D.C., USA

Mail: Office of Small Business, Agency for International Development, Washington, D.C., 20523, U.S.A.

The information contained in the notice shall be in the English language, and specifications shall be in terms of United States standards. If the notice as submitted does not comply with all the specified minimum notification requirements, it may be returned by OSB to the importer for revision and resubmission. In such cases, the revised notice must be submitted anew in accordance with the applicable requirements.

The notice of proposed procurement shall be submitted in the format set forth below. Guidance as to the information required in the individual paragraphs of the notice is contained, in the notes listed following the format.

(Format)

NOTICE OF PROPOSED PROCUREMENT

A. Country ..... (See Note A)
B. Authority ..... (See Note B)
C. Subauthority ..... (See Note C)
D. Source ..... (See Note D)
E. End of waiting period ..... (See Note E)
F. Buyer ..... (See Note F)
G. Commodity ..... (See Note G)
H. Value ..... (See Note H)
I. Bank ..... (See Note I)
J. Cablegram ..... (See Note J)
K. Delivery ..... (See Note K)
L. Other ..... (See Note L)

Note A. Designate the importing country (e.g., A. Country: India).

Note B. Identify, if known, the implementing document which authorizes the use of A.I.D. funds for the proposed procurement (e.g., B. Authority: 815-K-023).

Note C. Indicate, if applicable, the subauthorization (SA), and/or Import License (IL) numbers (e.g., C. Subauthority: SA 1501/IL, 6231).

Note D. Indicate the eligible source (area in which procurement may be made) as declared in the implementing document. List both the notice description and the number for the A.I.D. Geographic Code (e.g., D. Source: United States, 000).

Note E. Indicate the calendar date by which quotations or offers must reach the importer to secure their consideration. This date must be established as being at least forty-five (45) calendar days after expected receipt of notice in AID/W (Office of Small Business) (e.g., E. End of waiting period: 10 August 1964).

Note F. Indicate the name and complete address of the importer. This will be the person or organization who for this transaction is the purchaser. Telephone number may also be included if desired by such means is acceptable (e.g., F. Buyer: XYZ Import Company, Ltd., 14 Frank Street, Bombay, India, Tel. Bombay 3737301).

Note G. Fully describe the commodities and/or services (specifying ocean transportation and marine insurance) for which quotations or offers are desired. Specifications shall be in terms of United States standards and shall indicate sizes, quantities, etc. Electrical equipment shall include the power characteristics required. Data shall be in such sufficient detail so as to provide an adequate basis on which suppliers can submit realistic offers. Omission of the standards as herein prescribed will make the entire notice unacceptable.

Note H. Indicate the full dollar amount of the import license, except where the notice covers only part of the commodities included in the license. In such cases, show on any one notice only the approximate dollar value of the commodities included. The dollar value will not be published in the Small Business Circular except in those instances where the importer does not indicate a specific quantity, but instead, desires to purchase the greatest quantity for a given sum (e.g., H. Cost: $25,000).

Note I. Indicate basis on which quotations or offers are to be submitted: o.f.b. or c.i.f. Port of Entry; f.a.s. or f.o.b. Port of Exit; etc. (e.g., I. Basis: c.i.f. Bombay).

Note J. Indicate whether or not cablegram quotations will be accepted. If acceptable, show importer's cable address (e.g., J. Cablegrams: Acceptable, Cable, Bombay).

Note K. Indicate the date by which shipment from source country is required or desired, and the destination port (e.g., K. Delivery: Bombay, 15 November 1964).

Note L. Add any special shipping or packing instructions or other conditions and information which are applicable and not included in preceding paragraphs.

[F.R. Doc. 64-9029; Filed, Sept. 11, 1964; 8:49 a.m.]

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Exhibit 11

General Provisions for Bidding

(Revised September 26, 1963)

1. Application: "General Provisions for Bidding" as amended, are applicable to Invitation for Bids issued by the Office of Supply, Government of the Republic of Korea (hereinafter referred to as OSROK) and any contracts resulting therefrom, for furnishing equipment, supplies and or services including accessories, components, spare parts, etc. Even though the General Provisions for Bidding are not attached to the Invitation for Bids and contract resulting therefrom, they are hereby made part thereof.

2. Source of Funds: The source of funds will be indicated in the individual invitation for bids, i.e. AID PL 480 or DLF. In the event a contract is awarded under AID, PL 480 or DLF funds and the pertinent Letter of Commitment is not issued by AID, USDA or DLF, the contract shall be automatically invalidated and OSROK shall not be held for any liability or cost incurred thereunder.

3. Definitions and Abbreviations: The following terms and abbreviations used herein shall have the meaning as set forth below:

a. "Government" shall mean the Government of the Republic of Korea.
b. "Bidder" shall mean any person or organization, to which the contract shall be awarded by the government.
c. "Supplier" shall mean any person or organization, which furnishes any equipment, supplies and/or services under the contract.
d. "Contractor" shall mean both the bidder and the supplier.
e. "AID" shall mean the United States Agency for International Development.
f. "USDA" shall mean the United States Department of Agriculture.
g. "PL 480" shall mean the United States Public Law 480.
h. "DLF" shall mean the Development Loan Fund.

i. "SAC" shall mean the Surplus Agricultural Commodity.

4. PERFORMANCE BOND: Both the bidder and the supplier shall establish performance bond as follows:

(a) In case a contract is entered into directly with a foreign supplier:

[191] The supplier shall establish a performance bond with the bank in the United States of America holding the relative AID, USDA or DLF letter of commitment, within ten (10) business days if he resides in the United States, and twenty (20) business days if he resides outside of the United States after the dispatching date of of the credit advice by the above L/Com. bank, in the form of irrevocable clean credit, cash, certified check, bank guarantee, or surety bond issued by a prime insurance company or bonding company in the supplier's country, in an amount not less than five percent (5%) of the total contract value, to be valid until three (3) months after the latest shipping date or any extension thereof, payable in US Dollars. Performance bond shall be released or reduced to ten percent (10%) of ocean freight as specified in the additional requirement for supplier's performance bond, by the L/Com. bank upon negotiation of the final shipping documents showing satisfactory completion of inspection and shipment in accordance with the contract terms.

(b) In case a contract is entered into through a bidder residing in Korea:

(i) When the bidder is a Korean firm: The bidder shall establish a performance bond with the Bank of Korea, Seoul, Korea, in an amount not less than one percent (1%) of the contract value, in the form of cash, certified check, or national bond of the government, payable in Korean Won [sic].

(ii) When the bidder is a foreign firm: The bidder shall establish a performance bond with the Bank of Korea, Seoul, Korea, in an amount not less than one percent (1%) of the contract value, in the form of

irrevocable clean credit, cash, certified check, bank guarantee or surety bond, payable in US Dollars.

(iii) In either case of the above sub-paragraph (i) or (ii), the supplier shall establish a performance bond in an amount not less than four percent (4%) of the contract value with the same terms and conditions as stipulated in paragraph (a) above.

(c) All performance bond shall be advised through the Bank of Korea, Seoul, Korea, and available for payment against simple receipt of OSROK at sight on the Bank of Korea, Seoul, Korea, accompanied by the certificate of OSROK, stating that the contractor, supplier or bidder, as the case may be, has not complied with the terms and conditions of the contract. In any [192] event, if the contractor refuses or fails to make deliveries of equipment, supplies and/or services conforming to the contract specifications within the time specified, or any extension thereof, it shall be his responsibility to duly notify OSROK in writing of cause of such failure. Such notice must be filed with OSROK as soon as the default or anticipated default has been known, but, in any event, not later than thirty (30) days after the terminal contract delivery date. Failure on the part of the contractor to comply with this stipulation will automatically result in unconditional forfeiture of the performance bond.

(d) No performance bond shall be required in the event that the contract amount is less than one thousand US Dollars (US $1,000).

(e) In case of C&F/CIF acceptance on chartered vessel (not Berth Term Liner), the performance bond shall be reduced to ten percent (10%) of ocean freight upon negotiation of the final shipping documents as described in paragraph (a) above, and shall be valid for two (2) months in addition to three (3) months after the latest shipping date or any extension thereof for collection of dispatch incurred at the port of discharge. This portion of performance bond shall be available for payment against simple receipt accompanied by the statement of OSROK certifying that drawing has been necessitated for collection of dispatch incurred at the

port of discharge and shall be cancelled upon instruction of OSROK or on the expiry date whichever may be sooner.

5. DELIVERY: Delivery shall be effected upon presentation of clean on board ocean vessel or charter party bill of lading, freight prepaid, evidencing shipment in accordance with the contract delivery terms specified in the contract. Partial shipment or transshipment are prohibited unless otherwise stated in the contract.

6. GENERAL SPECIFICATIONS: All equipment and supplies furnished under the contract shall be in compliance with the requirement of the specifications stipulated in the contract; new and unused standard products, suitable in all respects for the services intended, manufacturer's most modern design, and equivalent or superior in all respects to products regularly supplied to the domestic trade by the manufacturer. Spare parts furnished shall be identical to original parts. Points not adequately described by the contract specifications shall be in accordance with the best commercial practices, and shall be sound, true to patterns, and free from injurious defects. All fittings necessary to complete the equipment shall be furnished [193] by the contractor at no extra charge beyond the price specified in the bid, whether or not mentioned in the bid specifications. Except as otherwise provided in the contract, no payment for extras shall be made, unless such extras and the prices thereof have been authorized by OSROK.

7. WARRANTY: The contractor shall guarantee that, at the time of delivery, the articles supplied under the contract will be free from any defects in material or workmanship and, will conform to the requirements of the contract, notwithstanding the fact that the government may have inspected and/or accepted the articles. Notice of any such defects or non-conformance shall be given by OSROK to the contractor within one year of the delivery of the defective or non-conforming equipment and supplies. If required by OSROK, within reasonable time after such notice, the contractor shall, with all possible speed, refurnish the defective or non-conforming article or part thereof in accordance with the delivery clause contained herein all at the expense of the contractor. This guarantee shall then

continue as to refurnished or replaced articles or parts thereof until one year after the date of the delivery. If OSROK does not require replacement or refurnishing of defective or non-conforming articles, the contractor, if required by OSROK within a reasonable time after the notice of defects or non-conformance, shall repay such portion of the contract price of the article as is equitable in the circumstances.

8. VARIATION IN QUANTITY: No variation in the quantity of any item called for by the contractor will be accepted, unless such variation has been caused by conditions of loading, shipping or packing, or allowance in manufacturing processes, and then only to the extent specified elsewhere in the contract.

9. INSPECTION: If independent inspection is deemed necessary, within a reasonable time from the effective date of the contract, OSROK shall appoint an inspector to inspect, at contractor's expense, the merchandise prior to delivery. It shall be contractor's responsibility to advise the inspector that the merchandise is ready for inspection at least twenty (20) days prior to any requirement for delivery. Upon receipt of such advice, the inspector shall inspect the merchandise without delay and will promptly and immediately issue a certificate of inspection of the merchandise or any part thereof. Any disapproval shall be based upon acceptable and standard practices. In the event the inspector disapproves any merchandise, contractor may tender additional quantities for inspection and approval in lieu of the merchandise [194] disapproved, provided such tender is made during the term of the contract. In the event the inspector fails to inspect the merchandise within twenty (20) days of being advised that merchandise is ready for inspection, then the contractor shall select an independent inspector to inspect the merchandise at contractor's expense. At the discretion of OSROK, non-acceptance by the inspector of any portion of the contract shall warrant rejection of the entire quantity. The contractor shall be responsible that the goods delivered to OSROK on board vessel or other designated point of delivery be the same goods described in the certificate of inspection. Acceptance of merchandise by the inspector designated by the government does not relieve the supplier from the contractual obligation.

10. Drawings and Manufacturer's Instructions: Within the time required by OSROK, the contractor shall forward by air mail to OSROK such documentations as required below, with relevant contract number and other reference numbers on each copy:

(a) General arrangement drawings,
(b) Installation drawings showing weight and dimensions of the heaviest part/s,
(c) Electric wiring circuit diagrams and list of electrical specifications,
(d) Assembly and sub-assembly drawings,
(e) Lubrication system circuit diagrams,
(f) Instructions for assembly, erection, operation and maintenance of the equipment,
(g) Certified test reports,
(h) Performance curves,
(i) List of spare parts included in the contract.

Two (2) copies each of the above shall be bound, wrapped in waterproof paper and packed with such complete lot of equipment shipped. All above mentioned documents shipped with equipment shall be listed on the packing list for the package in which they are shipped.

11. Sub-Contract: No sub-contract shall be made by the contractor with any party other than those who are described in the contract as supplier or manufacturer for furnishing merchandise contracted, without the written approval of OSROK.

12. Packing and Identification: Except as otherwise specified in the contract, all materials furnished shall be packed for export at the contractor's expense. Such packing must be sufficient [195] to insure safe arrival at the destination fully covering overseas shipping hazards. The bidder is required to include in his bid a detailed description of the packing he proposes to use. Parts and/or spare parts shipped, unattached or separately from the basic equipment, must be legibly identified by tags, labels or inscriptions in indelible ink, strictly in accordance with the reference marks or parts numbers of the basic equipment or the assembly drawings. On wood, plywood and veneer cases, barrels or kegs, all marks shall be applied by stencil with waterproof inks or oil paints, and these marks protected against

weathering by clear water resistant varnish. On metal or metal containers, marks shall be applied with waterproof oil paints. Characters shall be legible and not less than one (1) inch high, unless restricted by size of package. Packages and containers shall be marked on top and at least two sides. When metal tags are used they must be rust-proof. Tin or tern coated tags and uncoated steel tags are not considered rust-proof and must not be used. When paper tags are used, they must be free of rope-stock with a minimum thickness of 0.02 inches, weight per 500 sheets (22½" x 28") 200 pounds (tolerance ± 5%) and a minimum tearing resistance in both directions of 1,900 grains. Paper tags must be "double eyelet" and fastened at each eyelet. After marks have been applied to the tags, they must be coated with clear varnish.

13. PAINTING AND PROTECTIVE COATING: If the type of equipment furnished requires, bright surfaces or surfaces machined, to insure precision fit, finished appearance or smoothness shall not be painted but shall be protected against corrosive action by suitable protective coating. All other metal surfaces which are not normally painted shall be protected in the same manner. Protective coating materials shall be of types and formulas which will insure adequate protection to the surface in transit to the final destination. All other equipment parts shall receive one coat of high quality paint before assembly and a second coat after assembly. Parts not accessible for painting after final assembly shall receive two coats of paint prior to assembly. No painting shall be performed prior to inspection unless specifically approved.

14. MARKING: Marking shall be in strict accordance with Section 201.12 of AID Regulation 1, as amended, (particularly for AID emblem on commodity and container as to size and color), and shall contain the following information in frame commensurate with size of containers:

[196] (a) In case of procurement with AID funds:

AID EMBLEM
AID (PIO/C or PA Number)

In case of procurement with funds under PL 480:

UNITED STATES SURPLUS AGRICULTURAL COMMODITIES
(AP Number)

In case of procurement with DLF funds:
DLF EMBLEM
DLF (DLF Loan Number) .

(b) In addition to the above marking:
Contract Number as applicable,
Sub-Authorization Number as applicable,
Shipper's marks,
Consignee: OFFICE OF SUPPLY, REPUBLIC OF KOREA
Item Number where applicable; Package Number in sequence; and Quantity per package,
Net and Gross Weight, and Cubic Measurement,
Caution marks should be shown when applicable

15. PACKING LIST: Contents of each shipping package shall be itemized on a detailed list showing the exact weight, extreme outside dimensions (length, width and height) of each piece of container. If all pieces of containers are uniform in size or weight, the dimensions and weight of only one may be shown. One copy of the detailed packing list shall be enclosed in each package delivered. There shall also be enclosed in one package a master packing list summarizing and identifying each individual package which is a part of the shipment. The box number in which the master packing list is contained should be shown on each packing list. On barrels, bags, drums or kegs where it is not feasible to place the packing list inside the container, all pertinent information is to be stenciled on the outside and will constitute a packing list.

16. INSTRUCTION MANUAL: Whenever applicable, the contractor shall furnish printed instructions relating to proper maintenance and repair, and parts lists indicating various parts by name, number and diagram, with each unit of equipment.

17. PATENTS: Contractor shall hold and save OSROK, its officers, agents, servants and employees, free from liability of any nature or kind, including costs and expenses for or on account of any [197] patented or unpatented invention article, device or appliance manufactured or used in performance of this contract, including their use or disposal by or for OSROK.

18. PRICE CONTROL: Contractor shall guarantee that the price stated does not exceed his regular domestic price as adjusted by the export differential, and that such price is not higher than that charged other buyers similarly situated. Violation of this clause will entitle OSROK to rescind the contract and/or to claim a refund for the excessive price paid.

19. PAYMENT: Payment for procurement under the contract shall be made through irrevocable commercial letter of credit issued by the Bank of Korea, Seoul, Korea; and in case of procurement under AID, PL 480, or DLF funds, confirmed by the banking institution in the United States holding the relative letter of commitment. In case the contract is entered into through a bidder residing in Korea, the bidder shall apply to the Bank of Korea, Seoul, Korea, for issuance of the letter of credit promptly after the contract is signed, and pay the regular banking fees for opening the letter of credit. And in case the contract is entered into directly with foreign supplier, OSROK will apply to the Bank of Korea, Seoul, Korea, for issuance of letter of credit and pay the banking fee in accordance with procedures established between OSROK and the Bank. Unless otherwise specified in the contract, the letter of credit shall be established in favor of the foreign supplier in the amount of the total contract price. The letter of credit shall be maintained until one (1) month following the final delivery date specified by the contract. The letter of credit will be available for reimbursement upon presentation of the beneficiary's sight draft accompanied by the documents required in accordance with each respective regulation of AID, PL 480 or DLF, as the case may be, as set forth below:

(2) [sic] Supplier's certificate in duplicate with invoice and contract abstract on the reverse side covering the following:

(i) The cost of the commodities including ocean freight and a statement relating to the agent's commission to be executed by the supplier of the commodities.

(ii) The cost of ocean freight to be executed by the carrier.

(b) Supplier's detailed invoice showing quantity, description, gross sales price, net sales price (after deducting

all discounts and purchasing agent's commission, applicable), basis of delivery of the commodity or services, and/or

(i) Marked "Paid" by the supplier

(ii) Endorsed by, or accompanied by a certificate of an officer [198] in the banking institution indicating that payment has been made in the amount shown in the invoice.

(c) Inspection and weight certificate, together with marking certificate.

(d) Clean on board ocean vessel or charter party bill of lading, marked "freight prepaid" to port of destination, consigned to the Office of Supply, Government of the Republic of Korea.

(e) Detailed packing list.

(f) One copy of cablegram addressed to OSROK, containing PA PIO C Number, loading port, contract number, brief description of the commodity shipped, name of vessel, ETD and ETA and invoice amount of shipment.

20. Won [sic] Commission: When OSROK has received full set of the original shipping documents fully conforming with terms and conditions of the contract, and deems that all the terms and conditions of the contract have been fulfilled, then it will pay the contractor (except the supplier or sales agent) the commission in Won [sic] for importing foreign supplies at the rate stipulated in the Invitation for Bids. Conversion between Won [sic] and U.S. Dollars shall be based on the official conversion rate applicable at the time of contract. No Won [sic] commission will be paid when contract is made direct between OSROK and foreign supplier.

21. Liquidated Damages: OSROK shall, at its discretion impose the following penalties, when the contractor fails to make delivery, when due:

To deduct for each day of delay in delivery after the period granted, liquidated damages in the amount of 0.1 percent of the total value of the contract, or, if the contract has been partially performed within the stipulated time, the total value of the unperformed portion thereof. In this case, OSROK reserves the right to terminate the contract. OSROK shall deduct the value

of the penalty imposed from any money due, or which become due the contractor, or recover from the contractor's performance bond established under the contract.

22. DEFAULTS: If the contractor refuses or fails to make deliveries of articles or services conforming to the contract specifications within the time specified, or any extension thereof, or to perform faithfully any contract condition, OSROK, without prejudice to other rights of the contractor, resulting from breach of contract conditions, may by written notice terminate the right of the contractor to proceed with any or all of the remaining part to be performed. In the event of any such termina- [199] tion, OSROK may, without prejudice to its other rights resulting from breach of the contract conditions, obtain similar articles or services elsewhere, and contractor and his sureties, if any, shall be liable to OSROK for any excess cost imposed upon OSROK thereby. In addition, breach of contract conditions will automatically result in the unconditional forfeiture of the contractor's performance bond without recourse. In any event, OSROK reserves the right to recover from any money due or which may become due the contractor, for the abovementioned excess costs or for any other losses to OSROK resulting from the contractor's default or breach of the contract conditions. However, contractor shall not be charged with any excess cost imposed by OSROK, nor shall his performance bond be forfeited:

(a) When failure of the contractor in making suitable delivery is due to causes beyond his control and which could not reasonably have been anticipated and were without his fault or negligence including, but not restricted to, Acts of God or public enemy, acts of government whether as contractor or Sovereign, fires, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and delays and failures of a sub-contractor due to any of such causes unless OSROK determines that articles or services to be furnished under the subcontract are procurable in the open market.

(b) If the contractor notifies OSROK in writing of causes of such failure within ten (10) days from beginning

thereon or within such further period as OSROK shall decide the facts, the extent of failure and its decision shall be final and conclusive, subject to the parties hereto holding right to appeal as provided in the Article "DISPUTES".

23. DISPUTES: All decision of OSROK with respect to matters relating to a contract shall be final and conclusive except that if the contractor submits to OSROK, within twenty (20) days of the receipt of such decision, a formal request for appeal to arbitration with respect to any controversy or claiming arising out of or relating to the contract or the breach thereof; settlement shall be made by arbitration to be held in Seoul, Korea. The arbitration board is to consist of three parties; one appointed by OSROK, one by the contractor, and the third selected and appointed by the other two parties.

[200-201] 24. EXPORT TAX CLAUSE: Any export tax, fee or other charges of whatsoever nature now existing or which may hereafter be imposed shall be for contractor's account.

25. REFUNDS: Whenever bidder receives from his supplier a discount, adjustment credit and/or refunds he will notify promptly the Director, OSROK, of the amount of money received and the date of receipt and will make refunds thereof to OSROK.

26. OFFICIALS NOT TO BENEFIT: No officer, employee or other official of the government shall be admitted to any share or part of the contract or to any benefit that may arise therefrom.

27. INTERPRETATION: In the event of any disagreement between OSROK and the contractor in interpretation of the provisions or word used in this General Provisions for Bidding, and the terms and conditions of the Invitation for Bids, the interpretation of OSROK shall govern.

[202]

Exhibit 12

[X] WORK SHEET

ICA-11-CB (9-62) FAA	PROCUREMENT AUTHORIZATION APPLICATION INTERNATIONAL COOPERATION ADMINISTRATION UNITED STATES OF AMERICA WASHINGTON 25, D. C.	1. COUNTRY OR AREA Republic of Korea	2. APPLICATION NUMBER 489-3-30 PA 3007
		3. PROJECT NO.	4. ASSIGNED ON NUMBER 489-450-000-556-3701
		AMENDMENT NO.	
5. ALLOTMENT SYMBOL I/COM to a U.S. Bank		7. U.S. BANKING INSTITUTION J. Henry Schroder Banking Corporation, New York	8. APPROVED APPLICANT Bank of Korea
6. METHOD OF FINANCING			

9. PROPOSED PROCUREMENT AGENCY		10. PROPOSED AREA OF SOURCE United World-Wide (WW)	11. PROPOSED BASIS OF SHIPMENT See Page 2
COOPERATING COUNTRY OSROK	U.S. AGENCY -		
12. SCHEDULED CONTRACTING PERIOD FROM June 1, 1963 ENDING Oct. 31, 1963		13. REQUIRED DELIVERY PERIOD FROM June 1, 1963 ENDING Feb. 29, 1964	

14. ESTIMATE OF COSTS	AUTHORIZED CURRENCY: PROVISIONS	AUTHORIZATION VALUES* MONTAGE	STEVEDORE	TOTAL
(A) COMMODITY		14,560,000		14,560,000
(B) OCEAN FREIGHT		4,200,000		4,200,000
(C) LANDED COST (A + B)		18,760,000		18,760,000
(D) DOLLAR EQUIVALENT ($1.00)				

15. ITEM NO.	16. COMMODITY CODE	17. QUANTITY/DESCRIPTION/SPECIFICATIONS	18. ESTIMATED COST
		This application requests authorization only for the following commodities in amounts not to exceed 10% more than each of the values shown provided the total does not exceed the total shown in Block 14(C):	
1	233	Potash Fertilizers 2000 M/T 50% K_2O (K_2SO_4) 33000 M/T 60% K_2O (MOL)	2,000,000.-
2	235	Phosphate Fertilizers 110,000 M/T 46% P_2O_5 (Triple Super Phosphate)	12,560,000.-
3	950	Ocean Transportation	4,200,000.-
		Total (from 3901)	18,760,000.- + 17,943.66 18,777,943.66

19. SPECIAL INSTRUCTIONS AND COMMENTS

See attached continuation sheets

20. BASIS FOR AUTHORIZATION

See attached continuation sheets

21. FOR THE COOPERATING COUNTRY — Authorization of the procurement described herein is hereby requested. Procurement, pursuant to authorization issued on the basis of this application, will be carried out in accordance with terms and conditions contained in such authorization.

SIGNATURE: Director, Bureau of Public Construction, ROK — DATE: 5/6/63

22. USOM CLEARANCE — SIGNATURE: Assistant Director for Program and Economic Policy — DATE: 5/28/63

23. AID/W CLEARANCE — DATE:

UNOFFICIAL COPY MAY 10 1963 AID/W/C USOM/KOREA

[203] ☒ WORK SHEET ☐ REVISED PAGE 2 OF 4 PAGES

AID-1613 6-1-63	1. DESCRIPTION OF PIO. PIA	2. COUNTRY/ORGANIZATION OF ORIGIN Republic of Korea	3. AID/I NUMBER AID-3-10
Cont.	CONTINUATION SHEET INTERNATIONAL COOPERATION ADMINISTRATION UNITED STATES OF AMERICA	4. TITLE OR DESCRIPTION OF COMMODITY Fertilizers	

USE THIS FORM TO COMPLETE THE INFORMATION REQUIRED BY ANY BLOCK OF A PIO OR PIA FORM. REPEAT TITLE OF FORM ABOVE. INDICATE BLOCK NUMBER BELOW.

Block 11. FOB ports of shipment. FOB terms to be defined as "Spout Trimmed. Ocean freight will be arranged by ROKG under separate Invitation to Bid. Ocean freight costs for shipments on U.S. flag vessels only will be eligible for A.I.D. financing.

Block 17. For the purpose of this PIA, fertilizer shall be defined as fully cured, solid form chemical fertilizers, conforming to U.S. Federal specifications delivered in bulk in dry free flowing conditions. Materials under this PIA shall be procured from among the following list of eligible materials;

233. Potash Fertilizers (Bulk to the buyer. Minimum of 2000 M/T 50% K_2O (K_2SO_4), Minimum of 33000 M/T 60% K_2O (KCL) $2,000,000.-

235. Phosphates and Phosphatic Fertilizers (Bulk to the Buyer) $12,580,000 Triple Super Phosphate (Granular) 46% P_2O_5 APA bulk to the buyer (110,000 M/T P_2O_5)

950. Ocean freight for U.S. flag liner and/or tramp carriage of fertilizers under FIO terms. Filling and trimming costs beyond "Spout Trimmed" will be for the account of the carrying vessel. Priority of purchase will be first to the procurement of stipulated minimum tonnages of K_2O. Provision for bags and bagging will be for the account of the ROKG.

Block 19. Special Instructions and Comments

I. Delivery

Except for 5,000 M/T P_2O_5, the balance of the commodities are to be delivered within the dates shown in Block 13. For one cargo of 5000 M/T P_2O_5, delivery will be required within July 1, 1963 and August 1, 1963. This is to guarantee the availability of sufficient P_2O_5 to meet Fall 1963 requirements for new food acreage.

II. Evaluation of Bids

Phosphates and Potash

Bids will be evaluated on the lowest FOB cost per unit of plant food nutrient calculated on the basis of plant food nutrient specified in the materials listed.

Ocean Transportation

Bids will be evaluated at the lowest offered rates within each category of liner and tramp. However, priority will be given to evaluating bids so as to afford the most economic utilization of Korean flag vessels and still meet 50/50 shipping requirements.

[204] ☒ WORK SHEET ☐ WORKSHEET PAGE 3 OF 4 PAGES

	TITLE OF AGREEMENT OR PROJECT: PAA	2. COOPERATING COUNTRY: Republic of Korea	3. AID SYMBOL: 499-2-10
CODE	CONTINUATION SHEET INTERNATIONAL COOPERATION ADMINISTRATION UNITED STATES OF AMERICA	4. TITLE OR DESCRIPTION OF ITEM: Fertilizers	

USE THIS FORM TO COMPLETE THE INFORMATION REQUIRED IN ANY BLOCK OF A PIO OR PAA FORM. INSERT TITLE OF FORM ABOVE. INDICATE BLOCK NUMBER BELOW.

III. Fertilizer Condition

Fertilizer for the purpose of this PAA shall be fully cured, solid form chemical fertilizer, conforming to U.S. Federal Specifications. The fertilizer shall be in bulk and delivered at the contracted point of delivery to the buyer in a dry and free flowing condition.

IV. Inspection

Shipments from source country of bulk fertilizers shall be inspected prior to the loading into vessel and in accordance with the normal customs of the trade by an internationally recognized independent inspection service and analysed to determine that plant nutrient content, by Association of Official Agricultural Chemists (AOAC) Methods of Analysis, conforms to or is better than the contracted chemical and moisture content. Additionally inspection shall be made on the physical condition of the fertilizer. The inspection service shall certify as to the weights delivered to the ocean carrier. Cost of inspection must be included in the offering price and paid by the supplier. The inspection service shall be acceptable to both the buyer and seller, but will be selected by the buyer.

V. Delivery Date Compliance

Failure to meet the contracted delivery date will subject the supplier to a penalty as established by OSROK in the pertinent Invitation to Bid.

VI. PA 3701

Balance of $5,188.- remains in PA 3701 for use as part of the ocean transportation costs in this PAA.

Block 20. End-use Justification

With its population of over 26,000,000, Korea depends heavily upon its agricultural sector to maintain output of essential foodstuffs, to expand production in step with population increases, and to reduce the dependence of the economy on imported foodstuffs and industrial crop materials. Fertilizer imports are essential to the achievement of this goal. During the past several years Korean fertilizer imports have averaged in excess of $50,000,000 annually. The present level of fertilizer imports is expected to be reduced significantly in the near future to the extent that the output of the Chungju and Haju fertilizer plants are able to meet demand.

The ROK Government has estimated that fertilizer containing approximately 130,000 metric tons of P_2O_5 and 35,000 M/T of K_2O will be required to meet agricultural needs in Korea during the next 12 month. This PAA provides for

[205-206] ☒ WORK SHEET ☐ ISSUANCE Page 4 of 4 Pages

AID-10-3 (11-62)	TITLE OR DESCRIPTION OF PAR. PAA	1. COUNTRY/AREA/ORGANIZATION Republic of Korea	2. CODE NUMBER 489-3-10
COUNTRY	CONTINUATION SHEET INTERNATIONAL COOPERATION ADMINISTRATION UNITED STATES OF AMERICA	3. TITLE OR DESCRIPTION OF ACTIVITY Fertilizers	

USE THIS PAGE TO COMPLETE THE INFORMATION REQUIRED IN ANY BLOCK OF A PIO OR PAA FORM. INDENT TITLE OF FORM ABOVE. REPEAT BLOCK NUMBER ABOVE.

importing approximately 80% of the estimated P_2O_5 and K_2O requirements. Nitrogenous fertilizer requirements will be met from Korean Foreign Exchange.

The PAA as written provides for forward procurement for CY 1964 ROK fertilizer requirements. It provides for procurement during a period when the price of fertilizer is depressed and for deliveries to Korea during the dry weather months.

[207] EXHIBIT 13

AID-11-2 (10-56)

PA

PROCUREMENT AUTHORIZATION

DEPARTMENT OF STATE
AGENCY FOR INTERNATIONAL DEVELOPMENT
UNITED STATES OF AMERICA

1. COOPERATING COUNTRY: REPUBLIC OF KOREA	AUTHORIZATION NO.: 489-901-356-3009
3. APPROPRIATION SYMBOL: 72-1131006	4. ALLOTMENT SYMBOL: 356-64-489-56-39-31
5. CONTRACTING PERIOD: FROM- June 10, 1963 ENDING- Oct. 31, 1963	6. DELIVERY PERIOD: FROM- June 10, 1963 ENDING- Feb. 29, 1964
7. COMMODITY OR SERVICE DESCRIPTION: See Below	8. COMMODITY CODE: See Below
	ORIGINAL ☒ AMENDMENT NO.
9. BANKING INSTITUTION: J. Henry Schroder Banking Corporation New York 15, New York	10. APPROVED APPLICANT: Bank of Korea

11. AREA OF SOURCE	12. AUTHORIZATION VALUE — AUTHORIZED CURRENCY: U.S. DOLLARS			
	PREVIOUS TOTAL (a)	INCREASE (b)	DECREASE (c)	TOTAL TO DATE (d)
Limited World-Wide (90)		18,798,943		18,798,943

13. SPECIAL PROVISIONS

A. Funds made available by this authorization, up to the amount shown in Block 12(D), may be used for procurement of the commodities and/or services listed herein or for such other commodities and/or services as may be agreed upon in subsequent amendments to this authorization.

B. This authorization may be used only for the following commodities in amounts not to exceed 20% more than each of the values down provided the total does not exceed the total in Block 12(D):

233	POTASH FERTILIZERS (Bulk to buyer) F.O.B. 1. Minimum 2,000 M/T Sulphate of Potash (50% K_2O) 2. Minimum 33,000 M/T Muriate of Potash (60% K_2O)	2,000,000
235	PHOSPHATE AND PHOSPHATIC FERTILIZER MATERIALS (Bulk to buyer) F.O.B. 1. Minimum 110,000 M/T - 46% P_2O_5 (Triple super-phosphate, granular.	12,580,000
950	OCEAN TRANSPORTATION (Including Air Freight)	4,218,943

C. FOB ports of shipment. FOB terms to be defined as "Spout Trimmed". Ocean freight will be arranged by ROKG under separate Invitation to Bid. Ocean freight costs for shipments on U.S. flag vessels only will be eligible for A.I.D. financing.

AID MASTER COPY
(To be returned to AID
Washington 25, D. C.
PAA 48)-3-10

JUN 17 1963

(See reverse side for general provisions)

ACCEPTANCE

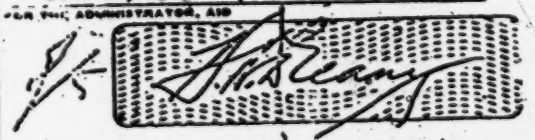
The cooperating country hereby acknowledges receipt of this Authorization and confirms that the assistance described herein has been requested and is to be furnished in accordance with and subject to the terms and conditions set forth herein.

DATE _____ FOR THE COOPERATING COUNTRY _____

DATE OF ORIGINAL ISSUANCE: June 10, 1963

DATE OF THIS ISSUANCE: June 10, 1963

FOR THE ADMINISTRATOR, AID



[208] **GENERAL PROVISIONS**

AUTHORITY

This authorization is issued under the authority contained in the Mutual Security Act and is subject to the terms and conditions herein specified and the provisions of ICA Regulation 1 as amended at any time up to the date of issuance of this authorization.

LETTER OF COMMITMENT

TO U. S. BANKING INSTITUTION SPECIFIED IN BLOCK 9

In consideration of your issuance or confirmation at your option of one or more commercial letters of credit or making at your option payment to suppliers (no such letter of credit to have a maturity, and no such payment to be made, later than the last day of the month following the terminal delivery date specified in Block 8 of this authorization), in accordance with application or request therefor by the Approved Applicant, the Administrator agrees with, and guarantees to you that, in accordance with the said Act, he will make reimbursement (without addition of interest or of your commissions, expenses or other charges) to the Approved Applicant in the manner and subject to the terms and provisions of Sections 201.16(c) and 201.22 of ICA Regulation 1, as in effect at the date hereof, of all amounts paid by you at sight under any such commercial letter of credit for the account of the Approved Applicant and the amount of all payments made by you at sight to suppliers for account of the Approved Applicant, up to but not exceeding the dollar amount specified in Block 19(D), for the procurement of the commodity or service specified herein, and subject to the special provisions referred to below. The making of reimbursement hereunder shall be governed solely by the terms and provisions of said Sections 201.16(c) and 201.22, incorporated herein by reference, and shall not be affected by any rights that the Administrator or the United States Government may have against the cooperating country, the Approved Applicant or third parties. In any action taken by you hereunder, you may rely fully on the authorities and signatures of the Approved Applicant as designated and identified by the Administrator or known to you from your own records.

You will be concerned only with the special provisions shown in Block 13 of this authorization under the heading "U.S. Banking Institution Responsibilities"

You are hereby approved as an assignee of the moneys due and to become due under this authorization.

If this commitment is satisfactory to you, please sign and return one copy of this authorization to the AID issuing office.

ACCEPTED FOR THE U. S. BANKING INSTITUTION

June 18, 1963
DATE

[illegible]
SIGNATURE

D. Ocean freight for U.S. flag liner and/or tramp carriage of fertilizers under FIO terms. Filling and trimming costs beyond "Spout Trimmed" will be for the account of the carrying vessel. Priority of purchase will be first to the procurement of stipulated minimum tonnages of K_2O. Provision for bags and bagging will be for the account of the ROKG.

E. BIDDING, EVALUATION AND AWARDS:

1. Bids will be evaluated and awards made on the basis of the lowest FOB cost per unit of plant food nutrient.

2. Bids will be evaluated for OCEAN TRANSPORTATION at the lowest offered rates within each category of liner and tramp. However, priority will be given to evaluating bids so as to afford the most economic utilization of Korean flag vessels and still meet 50/50 shipping requirements.

F. Delivery: Except for the 5,000 M/T P_2O_5, the balance of the commodities are to be delivered within the dates shown in Block 6. For one cargo of 5000 M/T P_2O_5, delivery will be required within July 1, 1963 and August 1, 1963. This is to guarantee the availability of sufficient P_2O_5 to meet Fall 1963 requirements for new food acerage.

G. Labeling: Standard A.I.D. Labeling.

H. Inspection: Shipments from source country of bulk fertilizers shall be inspected prior to the loading into vessel and in accordance with the normal customs of the trade by an internationally recognized independent inspection service and analyzed to determine that plant nutrient content by Association of Official Agricultural Chemists (AOAC) Methods of Analysis, conforms to or is better than the contracted chemical and moisture content. Additionally, inspection shall be made on the physical condition of the fertilizer. The inspection service shall certify as to the weights delivered to the ocean carrier. Cost of the inspection must be included in the offering price and paid by the supplier. The inspection service shall be acceptable to both the buyer and seller, but will be selected by the buyer.

I. Delivery Date Compliance: Failure to meet the contracted delivery date will subject the supplier to a penalty as established by OSROK in the pertinent Invitation to Bid.

J. Fertilizer Condition: Fertilizer shall be fully cured, solid form chemical fertilizer in free flowing condition, conforming to U.S. Federal specifications when loaded aboard vessel.

K. Information for Office of Small Business: (1) Compliance with A.I.D. Reg. 1, Sec. 201.13 is mandatory, except for a reduction in advertising period to 15 days from date of publication of invitation for 5,000 M/T P_2O_5. This material is needed to meet Fall 1963 requirements. (2) Original advertising should stipulate that if sufficient quantity of fertilizer cannot be bought

K. Information for Office of Small Business: (continued)

at a satisfactory price, the quantity awarded will be so limited. The remaining quantity will be subject to immediate retendering and awards after 10 days waiting period.

L. BARTER PROVISION: Any offer to supply commodities hereunder, involving a sale price of $100,000 or more, made on a bid basis pursuant to an invitation for formal bids and which expresses a willingness to accept surplus agricultural commodities from the Commodity Credit Corporation as full payment in lieu of dollars shall have preference over any other bid/offer where price and other terms of the bid/offer are equal. Bidders having such agreement must state that fact in their bids and applications for Letters of Credit must provide that payment for such bidders accounts will be made directly to the Commodity Credit Corporation.

M. ADDITIONAL DOCUMENTATION: Apart from the documentation required for reimbursement by Sec. 201.18 of A.I.D. Reg. 1, and other special provisions of the authorization, sub-authorizations under this authorization, will require suppliers to air mail as soon as possible a copy (or photostat) of each Bill-of-Lading and each charter party (where applicable) as follows:

1 Copy to: A.I.D., Office of Transportation, Washington, D.C.
5 copies to: US A.I.D., PE-PD, Seoul, Korea, of which one copy shall be marked to the attention of the Agriculture Division, US AID TC-AG.

N. To be eligible for reimbursement by A.I.D., suppliers documentation must include signed Independent Inspection Service Certificates, as specified in provision H above. Certificates shall state if shipment has or has not met specifications.

O. FUD-USE: Fertilizer bought under this PA must not be used for the production of surplus food or feeds which will result in substantially increasing exports nor for the production of tobacco and cotton.

P. OCEAN TRANSPORTATION PROVISION: Attached

Q. SOURCE-ORIGIN PROVISION: Attached

R. HONG KONG PROCUREMENT PROVISIONS: Attached

S. Letter of Commitment #489-1878.
"U.S. Banking Institution Responsibilities"

The bank shall only be concerned with A., B., C., and N. above, and P.1. and 3., Q.2. and R. attached

[211] OCEAN TRANSPORTATION AND GEOGRAPHIC SOURCE-ORIGIN SPECIAL PROVISIONS

P. Ocean Transportation

1. The cost of ocean transportation (Code 950) on U.S. flag vessels, and the cost of other services (Code 940) furnished in connection with the shipment of the commodities authorized herein, although not paid by the suppliers of the commodities, are also eligible for reimbursement hereunder.

2. The cost of ocean transportation on other than U.S. flag vessels (but not recipient country flag vessels) may be paid hereunder provided (i) U.S. flag vessels are ordinarily available for comparable movements, (ii) the shipment was originally intended to be made on U.S. flag vessels, and (iii) the Resources Transportation Division, A.I.D., Washington 25, D.C. determines that no U.S. flag vessels are available for the shipment and said office grants specific written authorization for the payment of such costs. Any payment so authorized will constitute an advance of funds to the cooperating country to be refunded to A.I.D. by the cooperating country upon demand.

3. Additional Documentation Required for Reimbursement: A letter or photostatic copy thereof, signed by the Resources Transportation Division, A.I.D., authorizing payment of ocean transportation costs on other-than U.S. flag vessels.

Invoices covering C&F or CIF shipments on other than U.S. flag vessels must show the ocean transportation costs and commodity costs separately when presented to banks and A.I.D. for payment of reimbursement.

Q. Geographic Source-Origin

1. Suppliers are required to certify that the commodities shipped hereunder are, with respect to both source and origin, from countries or areas included in the A.I.D. Geographic Code indicated in this authorization. The definition of the terms 'source' is found in Section 201.1(M) of A.I.D. Regulation 1. The term 'origin' means the country or area in which a commodity is mined, grown or produced. A commodity is produced when, through manufacturing processing or substantial and major assembling of components, a commercially recognized new commodity results that is substantially different in basic characteristics or in purpose or utility from its components.

2. The following certification on 'source' and 'origin' must be attached to or endorsed on each invoice presented for reimbursement and must be signed by the supplier or his authorized representative:

I (We) hereby certify that the 'origin' (as defined by A.I.D.) of the commodities listed on the attached invoice or invoiced herein is as shown below, that such 'origin', as well as the 'source' shown in Block 8 of AID Form 220, is included in the A.I.D. Geographic Code authorized in the procurement authorization under which this shipment is made, and that this information is true and correct in all respects.

Origin of Commodities _____

Signed _____ Date _____

Title _____

[212-222] R. HONG KONG PROCUREMENT
SPECIAL PROVISION

This authorization may not be used to purchase any commodity without a Treasury license if there is an interest in the commodity or in the transaction of a "designated national" including a "specially designated national" as defined in Sections 500.302 and 500.306 of the Foreign Assets Control Regulations. For the definition of "national" see Section 500.302 of the Regulations.

In addition to the restrictions set forth in this authorization, the limitations contained in Section 500.204 of the Foreign Assets Control Regulations are applicable hereto. The procurement of merchandise otherwise prohibited by Section 500.204 (a) (2), (3), and (4) may be permitted hereunder provided appropriate certificates of origin, as defined in Section 500.536 of the Regulations, are obtained by the Hong Kong supplier from the Hong Kong Department of Commerce and Industry. The certificates constitute additional documents that the supplier must present in order to secure payment.

[223] EXHIBIT 17

OFFICE OF SUPPLY
Government of the Republic of Korea
Seoul, Korea

June 19, 1963

INVITATION FOR BIDS
(OSROK STANDARD FORM III)

Invitation No. *AID–3057–N*
P.A No. *489–901–356–3009*

Sealed bids in seven (7) copies, subject to (1) Terms and Conditions of OSROK Standard Form III, including its commodity descriptions, (2) the General Provisions for Bidding, revised January 1, 1961, of the Office of Supply, Government of the Republic of Korea and (3) the United States Agency for International Development's Regulation 1, as amended, will be received at this office until

14:00 hours July 3, 1963 as for TSP 46% P205
14:00 hours July 31, 1963 as for TSP 46% P205

5,000 M/T

105,000 M/T and Potash Fertilizers and at that time publicly opened for furnishing the foreign supplies and/or services described in the accompanying commodity descriptions, for delivery FOB vessel, port of loading, and consigned to the Office of Supply, Government of the Republic of Korea.

Port of Discharge: One safe Korean port

Source —: Limited World-Wide (901)

Bid must be firm for *10 days* as for TSP 46% P205 5,000 M/T and *30 days* as for TSP 46% P205 105,000 M/T and Potash Fertilizers after the bid opening.

Seok Chu Paik, Administrator.

SPECIFICATION

Item No.	Code No.	Description	Quantity
		Any or all of the following type of fertilizers shall be acceptable.	
1.	233	*Potash Fertilizers (Bulk)*	$2,000,000 (Fund controlling quantity)
		a. Sulphate of Potash minimum 2,000 M/T 50% K2O	Minimum 2,000 M/T 50% K2O
		b. Muriate of Potash minimum 33,000 M/T 60% K2O	Minimum 33,000 M/T 60% K2O
2.	235	*Phosphate and Phosphatic Fertilizer Materials (Bulk)*	$12,580,000 (Fund controlling quantity)
		a. Triple Superphosphate Commercial granular minimum 110,000 M/T 46% P2O5	Approx. 110,000 M/T 46% P2O5

Note: A. *Definition of Granular:*

(Commercial) Free flowing, dry solid form.

B. *Limitation:*

In the event inspection results indicate that materials delivered do not meet the contractual chemical and physical specifications as established in this invitation, the materials will be rejected and pertinent inspection certificate will not be issued.

C. *Re-tender:*

If sufficient fertilizer cannot be procured at a satisfactory price under this invitation, the quantity awarded will be limited and the remaining quantity will be subject to re-tendering under the same terms and conditions as contained herein. Except that notices for retender will be delivered to all bidders responding to this invitation and deadline for receipt of bids will be set at ten (10) days after such notice has been delivered to said bidders.

[225] SPECIAL INSTRUCTION:

1. *Price:*

Price shall be stated in United States Dollars, based on FOB delivery in bulk without bags, in accordance with provisions stated herein, using the attached quotation format only, in terms of:

a. FOB vessel, port of loading (including inspection fee).

b. Price per unit quantity of fertilizer (M/T).

c. Price per unit of plant food nutrient.

d. The above c. the "price per unit of plant food nutrient" of fertilizer shall be computed on the basis of:

1) Contents of plant food nutrient according to AOAC Method.

2) Single minimum percentage of plant food nutrient guaranteed by the manufacturer.

2. *Evaluation of Bid:*

In conjunction with matching freight to allow for lowest landed cost, bid will be evaluated and awards made on the basis of the lowest FOB cost calculated on the basis of plant food nutrient for the fertilizer specified in the commodity description of this invitation.

3. *Fertilizer Conditions:*

Fertilizer shall be fully cured, solid form chemical fertilizer, conforming to US Federal Specifications. The fertilizer shall be in a dry and free flowing condition at the place and time of delivery to the buyer. In addition to the above, Triple Superphosphate shall be commercial granular.

4. *Inspection:*

a. Shipments of bulk fertilizer materials from source country shall be inspected prior to loading into vessel and in accordance with the customs of trade by

an internationally recognized independent inspection service and analyzed to determine that plant food nutrient content and physical condition of materials, by Association of Official Agricultural Chemicals (AOAC) methods of analysis, conforms to or is better than the contracted chemical content.

b. The inspection service shall certify as to the physical condition of material and weight delivered to the ocean carrier of bulk fertilizers.

[226] c. Tonnage certified by inspection service as delivered FOB ocean carrier will be accepted as is custom of the trade.

d. Cost of inspection must be included in the offering price and paid by the supplier.

e. The inspection service shall be acceptable to both the buyer and seller, but will be nominated by the buyer.

5. *Inspection Certificates:*

a. Certified copies (two) of the inspection and analysis certificates for each shipment must include plant food nutrient content, physical condition of material and total weight, and shall be submitted by the independent inspection service via air mail to:

1) Agency for International Development, Washington 25, D.C.
2) USOM/Korea. Attention: AD/P-SM, APO 301, San Francisco, California.
3) The Office of Supply, Seoul, Korea.
Attn: Bureau of Foreign Procurement.
4) The supplier (for attachment to documents to be submitted to the Bank for payment).

b. 1) The inspector shall not issue a certificate unless the commodities meet the specifications, terms and conditions stipulated in the contract.
2) The inspector shall airmail samples of fertilizer to the RDD-P. USOM. (Fertilizer Advisor), APO 301, San Francisco, California.

6. *Delivery of Fertilizer:*

Seller shall effect loading at buyer's call during the period from July 6, 1963 to August 1, 1963 as for TSP 46% P205 5,000 M/T and from August 1, 1963 to

February 29, 1964 as for balance at the port prescribed in the contract under the following terms and conditions:

a. Fertilizer to be loaded, stowed and spout trimmed on board overseas vessel, at the supplier's account. Any trimming and filling costs over and above "Spout Trimmed" including but not limited to dunnage will be for the account of the vessel.
b. OSROK shall provide vessel and give 14 days advance notice of vessel's expected readiness to load. Any storage or other charges, if any, caused by carrier's failure shall be for the account of OSROK.

[227] c. *Rate of Loading:*

1,500 M/T of 2204 lbs., per Weather Working Day, Sundays and Holidays are excepted, unless used, however, in the case of liner vessels where specific steamship conference terms are applicable, bids will specify the actual rate of loaded which is being offered under available rates.

If specific steamship conference terms are not applicable, bids will also specify rate of loading which is being offered. In the event Korean flag vessel is furnished for lifting cargoes, CQD (Customary Quick Despatch) term may be applied if agreeable to the supplier, if not agreeable, loading rate specified in above paragraph will be applied.

d. Any charge incurred at the loading port due to supplier's failure to make suitable delivery within the terminal delivery time shall be for the account of the supplier.

7. *Laydays are reversible:*

Laydays are reversible, but demurrage, if any, incurred at the port of loading shall be for the account of the supplier, and despatch earnings, if any, both at the port of loading and at the port of discharge, shall be settled beween ship-owner and OSROK.

8. *Performance Bonds:*

Both the bidder and the supplier shall establish performance bond as follows:

a. In case a contract is entered into directly with a foreign supplier:

The supplier shall establish a performance bond with the bank in the United States of America holding the relative letter of commitment, within ten (10) business days if he resides in the United States, and twenty (20) business days, if he resides outside of the United States, after the dispatching date of the credit advice by the above L/Com. bank, in the form of irrevocable clean credit, cash, certified check, bank guarantee, or surety bond issued by prime insurance company or bonding company in the supplier's country, in an amount not less than five (5) per cent of total contract value, to be valid until three months after the latest shipping date or any extension thereof, payable in US Dollars. Performance bond shall be released or reduced to one (1) percent of total contract value as specified in para. 8c. (Additional requirement for supplier's performance bond) by the L/Com. bank upon negotiation of the final shipping documents showing satisfactory completion of inspection and shipment in accordance with the contract terms.

[228] b. In case a contract is entered into through a bidder residing in Korea.

1) When the bidder is a Korean firm:

The bidder shall establish a performance bond with the Bank of Korea, Seoul, Korea, in an amount not less than one (1) percent of total contract value, in the form of cash, certified check, or national bond of the government, payable in Korea Won.

2) When the bidder is a foreign firm:
The bidder shall establish a performance bond with the Bank of Korea, Seoul, Korea, in an amount not less than one (1) percent of the total contract value, in the form of irrevocable clean credit, cash, certified check, bank guarantee or surety bond, payable in US Dollars.

3) In either case of the above sub-paragraph 1) or 2), the supplier shall establish a performance

bond in an amount not less than four (4) percent of the total contract value with the same terms and conditions as stipulated in paragraph a. above.

e. All performance bond/s shall be advised through the Bank of Korea, Seoul, Korea, and available for payment against simple receipt of OSROK at sight on the Bank of Korea, Seoul, Korea, accompanied by the certificate of OSROK, stating that the contractor, supplier or bidder, as the case may be, has not complied with the terms and conditions of the contract. In any event, if the contractor refuses or fails to make deliveries of suppliers and/or services conforming to contract specifications within the time specified, or any extension thereof, it shall be his responsibility to duly notify OSROK in writing of cause of such failure. Such notice must be filed with OSROK as soon as the default or anticipated default has been known, but, in any event, not later than thirty (30) days after the terminal contract delivery date.

Failure on the part of the contractor to comply with this stipulation will automatically result in unconditional forfeiture of the performance bond.

Additional requirement for supplier's performance bond:

The performance bond shall be reduced to one (1) percent of total contract value upon negotiation of the final shipping documents as described in paragraph a. above, and shall be valid for 2 months in addition to three months after the latest shipping date or any extension thereof for collection of demurrage if proven demurrage was incurred at the port of loading. This portion of performance bond shall be available for payment against simple receipt accompanied by the statement of OSROK, certifying that [229] drawing is necessitated for collection of demurrage incurred at the port of loading, and shall be cancelled upon instruction of OSROK or on the expiry date, whichever may be sooner. However, in the event no demurrage has been incurred and it has been evidenced by the laytime cal-

culation presented by the supplier to the L/Com. bank, it will be automatically released upon negotiation of the final shipping documents conforming to the contract.

9. *Geographic Source Origin:*

a. Suppliers are required to certify that the commodities shipped hereunder are, with respect to both source and origin, from countries or areas included in the AID Geographic Code indicated in this invitation. The definition of the term (source) is found in Section 201.1 (M) of AID Regulation 1. The term 'origin' means the country or area in which a commodity is mined, grown or produced. A commodity is produced when through manufacturing processing or substantial and major assembling of components, a commercially recognized new commodity results that is substantially different in basic characteristics or in purpose or utility from its components.

b. The following certificate on "source" and "origin" must be attached to or endorsed on each invoice presented for reimbursement and must be signed by the supplier or his authorized representative:

I (We) hereby certify that the 'origin' (as defined by AID) of the commodities listed on the attached invoice or invoiced herein, is as shown below, and that such 'origin' as well as the 'source' shown in Block 3 of AID, form 280, is included in the AID Geographic Code authorized in the procurement document under which this shipment is made, and that this information is true and correct in all respects.

Origin of commodities —

Signed — Date —

Title —

10. Should there be any conflict between the stipulation in these special instructions and terms of OSROK Standard Form III, the former shall govern.

Quotation Format
(For FOB Basis)

Commodity Description Quantity (M/T net)

a. *Unit price per M/T*
FOB vessel, at spout trimmed, port of loading (included inspection fee)

_____
(Indicate port of loading)
$_____

b. *Price per unit of plant food nutrient (per percentum of plant food nutrient)*
$_____

c. Delivery will be effected at buyer's call during the period from _____ to _____ at the loading port.

_____
(Indicate proposed port of loading)

Note: a. Unit price to be quoted to the limit of "cent" (US Currency) only.
b. Unit of plant food nutrient price to be quoted to sixth decimal place of dollars.
c. Chemical component to be quoted in one decimal place.
d. Price must be quoted for respective fertilizers in the separate quotation format.

[232] EXHIBIT 18

AID Small Business Circular

Trade Opportunities for American Suppliers

Issued By

DEPARTMENT OF STATE

Agency for International Development, Office of Small Business,

Washington 25, D.C. DUdley 3-7091

Sec.: No. 63-246
Date: June 28, 1963
M/L: 3-22

The permitted sources and origins of procurement for each item are indicated below. Definitions of the designations used for this purpose are given in the opposite column of this headnote.

Cuba remains an ineligible source and origin for A.I.D. financed purchases.

All A.I.D. financed shipments must be marked in accordance with A.I.D. regulations.

Please read all explanatory notes carefully.

United States (Code 000)—United States only.

Limited World Wide (Code 901) All free countries of the world *except*: Australia, Austria, Belgium, Canada, Denmark, France, Germany, Italy, Japan, Luxembourg, Monaco, Netherlands, New Zealand, Norway, South Africa, Spain, Sweden, Switzerland, and United Kingdom.

Limited World Wide (Code 898)—All free countries of the world *except*: Australia, Austria, Belgium, Canada, Denmark, France, Germany, Italy, Japan, Luxembourg, Monaco, Netherlands, New Zealand, Norway, South Africa, Sweden, Switzerland, United Kingdom, and Hong Kong.

World Wide (Code 899)—All countries of the world *except*: U.S.S.R., Eastern Europe, and China (Mainland).

FERTILIZER FOR KOREA

All of the information available to the Office of Small Business has been reproduced below. It is not anticipated

that further details will be received prior to contracting. Interested suppliers should immediately communicate with the buyer.

ITEM 1

Country:	Korea	
PA No.:	489–901–356–3009	
Source:	Limited World Wide (901)	
Buyer:	Office of Supply, Government of the Republic of Korea, Seoul, Korea	
Invitation No.:	AID–3057–N	
Commodity:	Code 233 *Potash Fertilizers (Bulk)*	*Quantity*
	a. Sulphate of Potash minimum 2,000 M/T 50% K2O Minimum 2,000 M/T 50% K2O	$2,000,000 (Fund controlling quantity)
	b. Muriate of Potash minimum 33,000 M/T 60% K2O Minimum 33,000 M/T 60% K2O	
Bid Deadline:	July 31, 1963, until 14.00 Hours KST	
Commodity:	Code 235 *Phosphate and Phosphatic Fertilizer Materials (Bulk)*	$12,580,000 (Fund controlling quantity)
	a. Triple Superphosphate Commercial granular minimum 110,000 M/T 46% P2O5	
Bid Deadline:	July 11, 1963 until 14.00 Hours KST — Quantity: 5,000 M/T	
	July 31, 1963 until 14.00 Hours KST — Quantity: 105,000 M/T	

[233] Sealed bids in seven (7) copies, subject to (1) Terms and Conditions of OSROK Standard Form III, including its commodity descriptions, (2) the General Provisions for Bidding, revised January 1, 1961, of the Office of Supply, Government of the Republic of Korea and (3) the United States Agency for International Development's Regulation 1, as amended. At that time publicly opened for furnishing

the foreign supplies and/or services described in the accompanying commodity descriptions, for delivery FOB vessel, port of loading, and consigned to the Office of Supply, Government of the Republic of Korea.

Port of Discharge: One safe Korean port

Source: Limited World-Wide (901)

Bid must be firm for *10 days* as for TSP 46% P205 5,000 M/T and *30 days* as for TSP 46% P205 105,000 M/T and Potash Fertilizers after the bid opening.

A. *Definition of Granular:*

(Commercial) Free flowing, dry solid form.

B. *Limitation:*

In the event inspection results indicate that materials delivered do not meet the contractual chemical and physical specifications as established in this invitation, the materials will be rejected and pertinent inspection certificate will not be issued.

C. *Re-tender:*

If sufficient fertilizer cannot be procured at a satisfactory price under this invitation, the quantity awarded will be limited and the remaining quantity will be subject to re-tendering under the same terms and conditions as contained herein. Except that notices for retender will be delivered to all bidders responding to this invitation and deadline for receipt of bids will be set at ten (10) days after such notice has been delivered to said bidders.

Special Instruction:

1. *Price:*

Price shall be stated in United States Dollars, based on FOB delivery in bulk without bags, in accordance with provisions stated herein, using the attached quotation format only, in terms of:

a. FOB vessel, port of loading (including inspection fee).
b. Price per unit quantity of fertilizer (M/T).
c. Price per unit of plant food nutrient.
d. The above c. the "price per unit of plant food nutrient" of fertilizer shall be computed on the basis of:

1) Contents of plant food nutrient according to AOAC Method.
2) Single minimum percentage of plant food nutrient guaranteed by the manufacturer.

2. *Evaluation of Bid:*

In conjunction with matching freight to allow for lowest landed cost, bid will be evaluated and awards made on the basis of the lowest FOB cost calculated on the basis of plant food nutrient for the fertilizer specified in the commodity description of this invitation.

[234] 3. *Fertilizer Conditions:*

Fertilizer shall be fully cured, solid form chemical fertilizer, conforming to U.S. Federal Specifications. The fertilizer shall be in a dry and free flowing condition at the place and time of delivery to the buyer. In addition to the above, Triple Superphosphate shall be commercial granular.

4. *Inspection:*

a. Shipments of bulk fertilizer materials from source country shall be inspected prior to loading into vessel and in accordance with the customs of trade by an internationally recognized independent inspection service and analyzed to determine that plant food nutrient content and physical condition of materials, by Association of Official Agricultural Chemicals (AOAC) methods of analysis, conforms to or is better than the contracted chemical content.

b. The inspection service shall certify as to the physical condition of material and weight delivered to the ocean carrier of bulk fertilizers.
c. Tonnage certified by inspection service as delivered FOB ocean carrier will be accepted as is custom of the trade.
d. Cost of inspection must be included in the offering price and paid by the supplier.
e. The inspection service shall be acceptable to both the buyer and seller, but will be nominated by the buyer.

5. *Inspection Certificates:*

a. Certified copies (two) of the inspection and analysis certificates for each shipment must include plant food nutrient content, physical condition of material and total weight, and shall be submitted by the independent inspection service via air mail to:

1) Agency for International Development, Washington 25, D.C.
2) USOM/Korea. Attention: AD/P-SM, APO 301, San Francisco, California.
3) The Office of Supply, Seoul, Korea
Attn: Bureau of Foreign Procurement
4) The supplier (for attachment to documents to be submitted to the Bank for payment)

b. 1) The inspector shall not issue a certificate unless the commodities meet the specifications, terms and conditions stipulated in the contract.
2) The inspector shall airmail samples of fertilizer to the RDD-P. USOM. (Fertilizer Advisor), APO 301, San Francisco, California.

6. *Delivery of Fertilizer:*

Seller shall effect loading at buyer's call during the period from *July 14, 1963* to *August 9, 1963* as for TSP 46% P205 5,000 M/T and from August 1, 1963 to February 29, 1964 as for balance at the

port prescribed in the contract under the following terms and conditions:

[235] a. Fertilizer to be loaded, stowed and spout trimmed on board overseas vessel, at the supplier's account. Any trimming and filling costs over and above "Spout Trimmed" including but not limited to dunnage will be for the account of the vessel.

b. OSROK shall provide vessel and give 14 days advance notice of vessel's expected readiness to load. Any storage or other charges, if any, caused by carrier's failure shall be for the account of OSROK.

c. *Rate of Loading:*

1,500 M/T of 2204 lbs., per Weather Working Day, Sundays and Holidays are excepted, unless used, however, in the case of liner vessels where specific steamship conference terms are applicable, bids will specify the actual rate of loaded which is being offered under available rates.

If specific steamship conference terms are not applicable, bids will also specify rate of loading which is being offered. In the event Korean flag vessel is furnished for lifting cargoes, CQD (Customary Quick Despatch) term may be applied if agreeable to the supplier, if not agreeable, loading rate specified in above paragraph will be applied.

d. Any charge incurred at the loading port due to supplier's failure to make suitable delivery within the terminal delivery time shall be for the account of the supplier.

7. *Laydays are reversible:*

Laydays are reversible, but demurrage, if any, incurred at the port of loading shall be for the account of the supplier, and despatch earnings, if any, both at the port of loading and at the port of discharge, shall be settled between ship-owner and OSROK.

8. *Performance Bonds:*

Both the bidder and the supplier shall establish performance bond as follows:

a. In case a contract is entered into directly with foreign supplier:

The supplier shall establish a performance bond with the bank in the United States of America holding the relative letter of commitment, within ten (10) business days if he resides in the United States, and twenty (20) business days, if he resides outside of the United States, after the dispatching date of the credit advice by the above L/Com. bank, in the form of irrevocable clean credit, cash, certified check, bank guarantee, or surety bond issued by prime insurance company or bonding company in the supplier's country, in an amount not less than five (5) percent of total contract value, to be valid until three months after the latest shipping date or any extension thereof, payable in US Dollars. Performance bond shall be released or reduced to one (1) percent of total contract value as specified in para. 8c. (Additional requirements for supplier's performance bond) by the L/Com. bank upon negotiation of the final shipping documents showing satisfactory completion of inspection and shipment in accordance with the contract terms.

[236] b. In case a contract is entered into through a bidder residing in Korea.

1) When the bidder is a Korean firm:

The bidder shall establish a performance bond with the Bank of Korea, Seoul, Korea, in an amount not less than one (1) percent of the total contract value, in the form of cash, certified check, or national bond of the government, payable in Korean Won.

2) When the bidder is a foreign firm:

The bidder shall establish a performance bond with the Bank of Korea, Seoul, Korea, in an amount not less than one (1) percent of the total contract value, in the form of irrevocable clean credit, cash, certified check, bank guarantee or surety bond, payable in US Dollars.

3) In either case of the above sub-paragraph 1) or 2), the supplier shall establish a performance bond in an amount not less than four (4) percent of the total contract value with the same terms and conditions as stipulated in paragraph a. above.

c. All performance bond/s shall be advised through the Bank of Korea, Seoul, Korea, and available for payment against simple receipt of OSROK at sight on the Bank of Korea, Seoul, Korea, accompanied by the certificate of OSROK, stating that the contractor, supplier or bidder, as the case may be, has not complied with the terms and conditions of the contract. In any event, if the contractor refuses or fails to make deliveries of suppliers and/or services conforming to contract specifications within the time specified, or any extension thereof, it shall be his responsibility to duly notify OSROK in writing of cause of such failure. Such notice must be filed with OSROK as soon as the default or anticipated default has been known, but, in any event, not later than thirty (30) days after the terminal contract delivery date.

Failure on the part of the contractor to comply with this stipulation will automatically result in unconditional forfeiture of the performance bond.

Additional requirement for supplier's performance bond:

The performance bond shall be reduced to one (1) percent of total contract value upon negotiation of the final shipping documents as described in paragraph a. above, and shall be

valid for 2 months in addition to three months after the latest shipping date or any extension thereof for collection of demurrage if proven demurrage was incurred at the port of loading. This portion of performance bond shall be available for payment against simple receipt accompanied by the statement of OSROK, certifying that

drawing is necessitated for collection of demurrage incurred at the port of loading; and shall be cancelled upon instruction of OSROK or on the expiry date, whichever may be sooner. However, in the event no demurrage has been incurred and it has been evidenced by the laytime calculation presented by the supplier to the L/Com. bank, it will be automatically released upon negotiation of the final shipping documents conforming to the contract.

[237] 9. *Geographic Source Origin:*

a. Suppliers are required to certify that the commodities shipped hereunder are, with respect to both source and origin, from countries or areas included in the AID Geographic Code indicated in this invitation. The definition of the term (source) is found in Section 201.1 (M) of AID Regulation 1. The term 'origin' means the country or area in which a commodity is mined, grown or produced. A commodity is produced when through manufacturing processing or substantial and major assembling of components, a commercially recognized new commodity results that is substantially different in basic characteristics or in purpose or utility from its components.

b. The following certificate on "source" and "origin" must be attached to or endorsed on each invoice presented for reimbursement and must be signed by the supplier or his authorized representative:

I (We) hereby certify that the 'origin' (as de-

fined by AID) of the commodities listed on the attached invoice or invoiced herein, is as shown below, and that such 'origin' as well as the 'source' shown in Block 3 of AID form 280, is included in the AID Geographic Code authorized in the procurement document under which this shipment is made, and that this information is true and correct in all respects.

Origin of commodities —

Signed — Date —

Title —

10. Should there be any conflict between the stipulation in these special instructions and terms of OSROK Standard Form III, the former shall govern.

[238] QUOTATION FORMAT
(For fob Basis)

Commodity Description Quantity (M/T net)

a. *Unit price per M/T*
FOB vessel, at spout trimmed, port of loading (included inspection fee)

_____
(Indicate port of loading)
$_____

b. *Price per unit of plant food nutrient (per percentum of plant food nutrient)*
$_____

c. Delivery will be effected at buyer's call during the period from _____ to _____ at the loading port.

_____
(Indicate proposed port of loading)

Note: a. Unit price to be quoted to the limit of "cent" (US Currency) only.
b. Unit of plant food nutrient price to be quoted to sixth decimal place of dollars.
c. Chemical component to be quoted in one decimal place.
d. Price must be quoted for respective fertilizers in the separate quotation format.

[239] ITEM 2

Country: Korea
PA No.: 489-901-356-3009
Source: Limited World Wide (901)
Buyer: Office of Supply, Government of the Republic of Korea, Seoul, Korea
Invitation No.: AID-3057-OT-N
Commodity: *Potash Fertilizers*

Approximately 10,000 M/T of 2204 lbs. of TSP

Bid Deadline: *July 11, 1963,* until 14.00 hours KST

Approximately 230,000 M/T of 2204 lbs. of TSP

Bid Deadline: *July 31, 1963,* until 14.00 hours KST

Approximately 60,000 M/T of 2204 lbs. of Potash

Bid Deadline: *July 31, 1963,* until 14.00 hours KST

Offers are invited in seven (7) sealed copies of ocean freight services of US flag liner and/or tramp vessels to move fertilizer in Bulk from the area of AID Geographical Code 901 to the Republic of Korea, subject to (1) Terms and Conditions of this invitation, (2) General Provisions for Bidding, revised January 1, 1961, of the Office of Supply, Government of the Republic of Korea, and (3) the United States Agency for International Development's Regulation 1, as amended.

Note: Tanker is not eligible under this tender.

TERMS AND CONDITIONS

1. *Commodity and Quantity:*

   a. Ocean freight on US flag tramp vessel and/or liner vessel for approximately 240,000 M/T of 2204 lbs of Triple Superphosphate and approximately 60,000 M/T lbs of Potash fertilizers.
   b. Ocean Transportation on other than US Flag vessel will not be eligible for AID financing under this Invitation for Bid.

2. *Statement of Layday:*

Ship-owners are required to state the proposed loading layday of the vessel during the period from July 14, 1963 to August 9, 1963 as for approx. 10,000 M/T of 2204 lbs of TSP, August 1, 1963 to February 29, 1964 as for approx. 230,000 M/T of 2204 lbs of TSP and approx. 60,000 M/T of 2204 lbs. of Potash.

3. *Ocean Freight and Shipping Term:*

Ship-owners are required to quote ocean freight on the following basis using the attached QUOTATION FORMAT.

a. Per metric ton (M/T) of 2204 lbs on US tramp and/or liner vessel respectively for Phosphate fertilizer and Potash fertilizer.
b. Freight separately if offered from:

1) A port on the US Pacific Coast
2) A port on the US Atlantic Coast
3) A port on the US Gulf of Mexico
4) A port in Tunisia
5) A port in Portugal
6) Other eligible ports

To: One safe port of the Republic of Korea.

c. Cargo will be discharged at one of the following safe ports of the Republic of Korea.

PUSAN, INCHON, MASAN, YOSU, MOKPO, KUNSAN, AND CHANGHANG.
OSROK reserves the right to nominate any of the above ports.

d. F.I.O. terms.

[240] 4. *Ocean Freight Escalation:*

Ocean freight escalation for liner vessel may be allowed only if and when there is a change in conference tariff rates for Korea between the date of bidding and the date of shipment, however evaluation of bid shall be made on the basis of the bid price offered.

5. *Supporting Documents to Bid:*

Ship-owner's commitment in which the following is stated:

a. Name of Vessel
b. Ocean freight per metric ton of 2204 lbs.
c. Layday schedule
d. Liner or tramp vessel
e. Total tonnage available per vessel voyage
f. Statement that ship-owner will take full responsibility and obligation for accomplishment of the contract in accordance with the terms and conditions stipulated in this invitation.

6. *Notification of Arrival:*

Master of vessel shall contact ship's agent not less than five days off Korea for instructions as to port of discharge.

7. *Dunnage Materials and Stowage:*

a. Vessel shall provide all dunnage, including shifting boards and feeders.
b. Cargo to be stowed and spout trimmed at the expense of the supplier, and any trimming and filling costs over and above "Spout Trimmed" will be for the account of the vessel.

8. *Vessel to Supply:*

Vessel to supply at both ends at all times free of charge to charterers, winches, steam, and gear in condition, and to provide adequate lighting for night work in the holds.

9. *Loading and Discharging:*

a. *Rate of Loading:*

1,500 M/T of 2204 lbs per Weather Working Day, Sundays and Holidays are excepted, unless used. However, in the case of liner vessels where specific steamship conference terms are applicable, bids will specify the actual rate of loading which is being offered under available rates.
If specific steamship conference terms are not

applicable, bids will specify rate of loading which is being offered.

b. *Rate of Discharging:*

In case of tramp vessel, 240 M/T of 2204 lbs per hatch per Weather Working Day, Sundays and Holidays are excepted, unless used, and when used, the time actually worked shall be counted as laytime.

In case of liner vessel, 1,000 M/T of 2204 lbs per Weather Working Day, Sundays and Holidays excluded, except in those instances where only "Running Days" are available as per the relative conference terms in which instance "Running Days" terms will be applied.

c. *Laydays are reversible:*

Laydays are reversible, but demurrage, if any, incurred at the port of loading shall be for the account of the supplier (Charterer), and despatch earnings, if any, both at the port of loading and at the port of discharge, shall be settled between ship-owner and OSROK.

[241] d. *Layday Commencement:*

In case of tramp vessel, time for unloading shall commence to count twenty-four (24) hours after written notice has been given during office hours, on any day except Sundays and Holidays, to the port office of OSROK by the master or agent of the vessel that the vessel is ready to unload the cargo in all respects.

When unloading is commenced earlier, then the time actually commenced shall be counted as laytime.

10. *Charter Party/Liner Booking Contract:*

Ship-owners shall arrange the relevant charter parties or liner booking contracts to be signed in Seoul, Korea, within seven (7) business days after award.

11. *Transmittal of Shipping Documents:*

a. *Airmail of Shipping Documents:*

Ship-owners shall be required to airmail respectively to "Office of Supply, Government of Republic of Korea, Seoul, Korea. Attention: Bureau of Foreign Procurement" and "US AID, AD/P-SM. Seoul, Korea" five (5) copies and one (1) copy to AID Office of Transportation, Washington, D.C., each of the following documents as soon as they become available:

1) Invoice
2) Non-negotiable copies of ocean vessel bill of lading
3) Laytime computation and statement of facts effected at the port of loading
4) Charter party or liner booking contract.

b. *Documents on Board:*

The following documents in a sealed envelope, must be placed aboard the ocean vessel by supplier at the time of shipment, in care of the shipmaster, marked:

"Deliver to Consignee: Office of Supply, Republic of Korea"

1) One copy of clean on-board ocean vessel bill of lading
2) One copy of suppliers detailed invoice
3) One copy of packing list
4) One copy of inspection certificate
5) One copy of charter party or liner booking contract.

12. *Award:*

Award will be made within 30 days after opening of bids, and the Office of Supply, Government of the Republic of Korea, reserves the right to reject any or all bids, or waive any defects in bids received, as the best interests of the government may require.

[242]

13. *Payment:*

Payment shall be made by in irrevocable letter of credit for 90% of total freight against bill of lading quantity and balance of freight shall be paid, upon completion of discharge and settling despatch earnings, if any, at the port of loading and discharge, through US Banking institution holding relative letter of commitment under Agency for International Development's Procurement Authorization No. *489-901-356-3009.*

14. *Penalty:*

In the event that shipment/s are not affected during the shipping period specified in the contract due to a failure on the part of the ship-owner, a penalty in the amount of 0.1% per day of the total invoice value of the delayed shipments will be imposed upon the ship-owner.

15. *Responsibility of Additional Charges:*

a. Any storage or other charges, if any, caused by carrier's failure at the loading port, such as not being on berth during contracted laydays, shall be for the account of shipowner.

b. Any charges incurred at the loading port due to supplier's failure to make suitable delivery within the contracted delivery time shall be for the account of the supplier. (Charterer).

16. R. H. Wall, Inc. 1331 G Street, Northwest, Washington 5, D.C., U.S.A., is designated foreign freight forwarder (agent) for OSROK on shipments originating in the United States. As such agent, R. H. Wall, Inc., will be responsible for the proportion and submission to proper offices for issuance of ocean bills of lading and shippers export declaration. R. H. Wall, Inc. will be entitled to any ship brokerage fee which may be payable.

17. All other terms and conditions not specified herein are in accordance with the customs of the trade.

18. *Reference:*

The terminal delivery date is *February 29, 1964.*

[243-263] *Item _ (Continued)*

QUOTATION FORMAT

Date:_____

1. Name of Vessel: SS_____
2. *Freight per metric ton of 2204 lbs:*
   for Potash fertilizer (US Tramp $_____
   (US Liner $_____

   Freight per metric ton of 2204 lbs:
   for Phosphate fertilizer (US Tramp $_____
   (US Liner $_____
3. Loading Quantity:_____
4. *Layday Statement:*
   Layday of the above vessel will be as follows:
   a. Name of Loading port:_____
   b. Layday Schedule :_____
5. *Demurrage and Despatch:*
   a. Demurrage: US$_____
   b. Despatch: US$_____
6. *Name of owner and address:*

Freight respectively for Potash fertilizer and Phosphate fertilizer shall be quoted separately per vessel (US Liner and US Tramp) and per coast (US Pacific coast, US Gulf of Mexico and US Atlantic coast, Tunisia and Portugal) to one safe Korean port using separate quotation sheet.

I (We) will take full responsibility and obligation for accomplishment of contract in accordance with the terms and conditions of this invitation for bid, General Provisions for Bidding OSROK, and provisions of AID Regulation 1, as amended.

_____
(Bidder's Signature)

***

[264] EXHIBIT 24

Office of Supply
Government of The Republic of Korea
Seoul, Korea

Cable Address: O S R O K
Seoul, Korea

Tel: 72-5261-5
72-5366-9

August 17, 1963

Concentrated Phosphate
Export Associations Inc.

Re: Notice of Award, Invitation No. AID 3057-N Cont. No. F-KOS-32022-N

Gentlemen:

This is to inform you that your bid/s submitted under the captioned Invitation has been accepted by this office as follows:

Amount accepted: US$8,985,250.00

Commodity and Q'ty accepted: TSP 46% P2O5 176,000 M/T

For further details, please refer to the attached list of the Successful Bidder/s.

Your guidance and proper action in this regard will be highly appreciated.

Sincerely yours, E Hoon Kim, Director, Bureau of Foreign Procurement.

Office of Supply
Government of The Republic of Korea
Seoul, Korea

Cable Address: O S R O K
Seoul, Korea

Tel: 73-5261-5
73-5268-9

[265] August 24, 1963

Concentrated Phosphate Export Association, Inc.

Re: Notice of Additional Award, Invitation No. AID 3057-N, Contract No. P-KOS-32022-N-1

Gentlemen:

This is to inform you that your bid/s submitted under the captioned Invitation has been accepted additionally by this office as follows:

Amount accepted: $61,200.00
Commodity accepted: TSP 46% 1,200 M/T

For further details, please refer to the attached list of the Successful Bidder/s. Your guidance and proper action in this regard will be highly appreciated.

Sincerely yours, E Hoon Kim, Director, Bureau of Foreign Procurement.

[266] CONTRACT SHEET

PA No. 3009
Project: Fertilizer
Inv. No. AID 3057-N — Date of Opening: 7/31/63
Contract No. F-KOS-32022-N-1 & 2 — Date of Contract: 8/17/63
S.A. No._____ — Contract Item:_____
Commodity: TSP P205 46% Min. Commercial Granular
Quantity: 177,200 M/T
Contract Amount: US $9,046,450.00

Delivery Basis: FOB — Flag of Vessel: US Liner: 68,650 M/T; US Tramp: 60,700 "; Korean flag: 47,850 "

Shipping period: 158,700 M/T: 8/1-12/31; 18,500 M/T: 5/1-2/29/64 — T/A:_____
Port of Loading: Tampa
Port of Discharging: One safe Korean port
Contractor: Concentrated Phosphate Export Association Inc.
Supplier: Ditto
Manufacturer: CPEA Members
Source of Supply: U.S.A.

Non-Project Section
Bureau of Foreign Procurement
Office of Supply, ROK

[267] Invitation No. AID 3057-N

PA No. 489-901-356-3009

BID Date of Bid: July 31, 1963

In compliance with the above Invitation for Bids, the General Provisions for Bidding, revised January 1, 1961, of the Office of Supply, Government of the Republic of Korea, and the United States Agency for International Development's Regulation 1, as amended, the undersigned duly offers and agrees, if this bid be accepted within 30 calendar days after the date of opening, to furnish any or all of the item/s upon which prices are quoted, at the price set opposite each item, delivered at point specified, within the delivery time specified in our offer:

Manufacturer: *Concentrated Phosphate Export Association, Inc.*
Source of Supply: *U. S. A.*
Bidder: *Concentrated Phosphate Export Association, Inc.*
Address: *420 Lexington Avenue, New York 17, N.Y. U.S.A.*
Supplier: *Concentrated Phosphate Export Association, Inc.*
Address: *420 Lexington Avenue, New York 17, N.Y., U.S.A.*
Telephone No.: *Murray Hill 6-4415*
Nationality: *U. S. A.*
Shipping Terms: *FOB vessel, port of loading.*

William J. Rabel, Secretary, Concentrated Phosphate Export Association, Inc.

AWARD

Accepted by the Government as to item/s numbered:

Contract Number: F-KOS-32022-N
Total Amount: US$9,046,450.00
Date of Contract: 8/17/63

The Government of the Republic of Korea, Seok Chu Paik, Administrator, Office of Supply.

[268] July 31st, 1963

Invitation No. AID 3057-N
PA No. 489-901-356-3006

The Administrator
Office of Supply
Government of the
Republic of Korea
Seoul, Korea

Dear Sirs:

We hereby certify that the Triple Superphosphate, Commercial Granular, offered in the attached bid form and quotation formats is manufactured in the United States of America.

Yours faithfully, Concentrated Phosphate Export Association, Inc. William J. Rabel, Secretary.

[269] QUOTATION FORMAT
Alternative No. 1

Commodity Description	Quantity (M/T net)
Triple Superphosphate Commercial Granular Minimum 46% P_2O_5.	240,000 metric tons in bulk. 18,500 M/T only

A) *Unit price per M/T*
FOB vessel, port of loading (inspection fee included)
Each vessel, one berth, one port, Tampa Range (East Tampa, Seddon Island, Port Tampa, Boca Grande), Florida
$51.50 per metric ton, inspection fee included.

B) *Price per unit of plant nutrient (per percentum of plant nutrient)*
$1.119565

C) *Total price*
$12,360,000.00

D) Delivery will be effected at the loading rate of 2,500 M/T, per Weather Working Day, Sundays and Holidays are excepted, unless used, at buyer's call during the period from August 1, 1963 to February 29, 1964 at the loading port
Each vessel, one berth, one port, Tampa Range (East Tampa, Sedden Island, Port Tampa, Boca Grande), Florida
Buyer to give seller at least 14 days advance notice of expected readiness to load for each vessel nominated.

Signed *William J. Rabel, Secretary,* Concentrated Phosphate Export Association, Inc.

[270] QUOTATION FORMAT
Alternative No. 3

Commodity Description	Quantity (M/T net)
Triple Superphosphate	240,000 metric tons in bulk.
Commercial Granular	
Minimum 46% P_2O_5.	158,700 M/T only

A) *Unit price per M/T*
FOB vessel, port of loading (inspection fee included)
Each vessel, one berth, one port, Tampa Range (East Tampa, Seddon Island, Port Tampa, Boca Grande), Florida
$51.00 per metric ton, inspection fee included

B) *Price per unit of plant nutrient (per percentum of plant nutrient)*
$1.108695

C) *Total price*
$12,240,000.00

D) Delivery will be effected at the loading rate of 2,500 M/T, per Weather Working Day, Sundays and Holidays are excepted, unless used, at buyer's call during the period from August 1, 1963 to December 31, 1963 at the loading port
Each vessel, one berth, one port, Tampa Range (East Tampa, Seddon Island, Port Tampa, Boca Grande), Florida
Buyer to give seller at least 14 days advance notice of expected readiness to load for each vessel nominated.

Signed *William J. Rabel, Secretary,* Concentrated Phosphate Export Association, Inc.

[271] PA No. 489-901-356-3009

Invitation No. AID-3057-N Specification

Commodity Code No.	Item No.	Description	Quantity	Unit
235	2-a	Triple Superphosphate Commercial Granular Minimum 46% P_2O_5 contents of plant nutrient according to AOAC methods, in bulk.	240,000	M/T

Last Item

[272] July 31st, 1963

The Administrator
Office of Supply
Government of the
Republic of Korea
Seoul, Korea

Supplier's Certificate, Re: OSROK Invitation for Bids No. AID 3057-N, PA No. 480-00[illegible]356-3009, Dated June 10, 1963

Dear Sirs:

This is to certify that we will undertake to supply the above tender in accordance with the details listed below. If our bid is accepted within 30 days after the opening of the tender, we will take full responsibility and obligation for the accomplishment of the contract in accordance with the terms and conditions of the invitation for bids, the General Provisions for Bidding, revised January 1, 1961, issued by OSROK, and provisions of AID Regulations No. 1, as amended.

If our bid is accepted, we confirm that we will supply the following:

Commodity: Triple Superphosphate, minimum 46% P_2O_5 guaranteed, content of plant nutrient according to AOAC methods.
Producer: Concentrated Phosphate Export Association, Inc. of the U.S.A.
Quantity: 240,000 metric tons.
Shipment: In accordance with the shipment schedules and rate of loading shown on the attached quotation formats.
Price: As per quotation formats attached.
Packing: In bulk.
Inspection: Fees are included in the FOB prices.
Payment: By irrevocable and confirmed letter of credit in U.S. dollars, in accordance with the AID PA No. 489-901-856-3000, in favor of Concentrated Phosphate Export Association, Inc. Letter of Credit to be opened at least 14 days in advance of the first shipment.

Please refer to our bid form and quotation formats for further details.

Concentrated Phosphate Export Association, Inc.
William J. Rabel, Secretary.

[273] July 31st, 1963

The Administrator
Office of Supply
Government of the
Republic of Korea
Seoul, Korea

Manufacturer's Certificate Invitation No. AID-3057-N, PA No. 486-901-358-3009 to be held July 31st, 1963 at OSROK, Seoul, Korea

Dear Sirs:

Regarding the subject Invitation for Bids, we hereby certify that we are manufacturers/suppliers of Triple Superphosphate, and we undertake to offer our product under the following terms and conditions:

1) Commodity Description: Triple Superphosphate, Commercial Granular
2) Content of Plant Nutrient accordance to AOAC Methods: Minimum 46% P_2O_5 Guaranteed
3) Quantity: 240,000 metric tons in bulk.
4) Delivery date: For shipment from one berth, one port, Tampa Range (East Tampa, Seddon Island, Port Tampa, Boca Grande), Florida in accordance with the shipment schedules and rate of loading shown on the attached quotation formats and supplier's certificate.

Yours faithfully, Concentrated Phosphate Export Association, Inc. William J. Rabel, Secretary.

[274-275] July 31st, 1963.

The Administrator
Office of Supply
Government of the
Republic of Korea
Seoul, Korea

Dear Sirs:

The members of the Concentrated Phosphate Export Association, Inc. are:

American Cyanamid Co.
Princeton, New Jersey, U.S.A.
Plant—Brewster, Florida, U.S.A.
Davison Chemical Division,
W. R. Grace Co.
Baltimore, Maryland, U.S.A.
Plant—Ridgewood, Florida, U.S.A.
International Minerals & Chemical Co.
Skoki, Illinois, U.S.A.
Plant—Bernie, Florida, U.S.A.
U.S. Phosphoric Products Division,
Tennessee Corporation,
Tampa, Florida, U.S.A.
Plant—East Tampa, Florida, U.S.A.
Virginia Carolina Chemical Co.
Richmond, Virginia, U.S.A.
Plant—Nichols, Florida, U.S.A.

All of these companies manufacture triple superphosphate, both granular and standard.

Yours faithfully, Concentrated Phosphate Export Association, Inc. William J. Rabel, Secretary.

[276]

EXHIBIT 25

대 한 민 국 조 달 청
OFFICE OF SUPPLY
GOVERNMENT OF THE REPUBLIC OF KOREA
SEOUL, KOREA

조달청참조번호
OSROK Ref. No. KOS- 34004-M

일 자
DATE: August , 1963

관계자 귀하
TO WHOM IT MAY CONCERN:

계약 요점 및 신용장 개설 사항에 관한 통지서
NOTIFICATION OF CONTRACT ABSTRACT AND OPENING OF LETTER OF CREDIT

금번 당청에서 별지와같이 계약을 체결코 관계신용장 개설을 한국은행을 통하여 요청하였기 알리나이다
Please be advised that a contract has been signed by this office and the opening of the relative letter of credit has been applied for through the Bank of Korea as per the attached.

구매승인서번호 PA/PIO/AP NO:	입찰공고번호 INVITATION NO:	계약번호 CONTRACT NO:	계약일자 DATE OF CONTRACT:
489-901-356-3009	AID-8057-M	F-KOS- 82082-M-1 82082-M-2	August 17, 1963
구매승인금액 PA/PIO/AP AMOUNT	계약금액 CONTRACT AMOUNT:	실수요자 END-USER:	
US$18,804,948.00	US$9,048,450.-	M.O.A.F.	
구매승인서상 최종계약기일 Contract Ending Date in PA/PIO/AP:	구매승인서상 최종인도기일 Delivery Ending Date in PA/PIO/AP:	미국내 지불거래은행 L/Com. Bank:	
October 31, 1963	February 29, 1964	J. Henry Schroder Banking Corp. New York 15, N. Y.	

공급자의 성명 및 주소
SUPPLIER'S NAME & ADDRESS: Concentrated Phosphate Export Association, Inc. 420 Lexington Avenue, New York 17, N. Y., U.S.A.

공급자 한국대리점의 성명 및 주소
NAME & ADDRESS OF SUPPLIER'S REPRESENTATIVE IN KOREA (If any)

선적조건 Shipping Terms:	인도조건 Delivery Terms:
U.S. flag liner, tramp & Korean Tramp Vessel.	FOB port of loading

비고 REMARKS: 1. 구체적인 사항에 관하여는 별첨된 신용장 개설 신청서를 참조하시압
For details, please refer to the attached application for the letter of credit.

어분비
Sincerely yours,
청장위임전결
FOR THE ADMINISTRATOR

별첨 신용장 개설 신청서
Encl. Application for letter of credit:

외자국장
Director
Bureau of Foreign Procurement

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OSROK Reference No. KOS-34001-11

(PA No.) (3) 489-901-356-3009

(beneficiary) (4) Concentrated Phosphate Export Association, Inc. 420 Lexington Avenue, New York 17, N. Y., U.S.A.

(accountee) (5) Office of Supply, Government of the Republic of Korea, Seoul, Korea.

(amount) (6) US$ 9,046,450.-

(freight) (7) Prepaid

(from) (8) Tampa Range, Florida, U.S.A.

(to) (9) One safe Korean Port

(ship. date) (10) Item 1: At buyer's call during the period from August 1, 1963 to December 31, 1963.
Item 2: At buyer's call during the period from August 1, 1963 to February 29, 1964.

(Partshipment) (11) Allowed
(transshipment) (12) Prohibited

(insurance) (13) Buyer insures

(Commodity) (14)

Code : 235

Item 1: (Contract No. F-KOS-32022-N-1)
158,700 metric tons, net, in bulk, 5% less tolerance allowed, of Triple Superphosphate commercial granular 46% P2O5 APA min., gurantsed according to AOAC Method, fully cured, solid form, chemical fertilizer conforming to US Federal Specifications in a dry, free flowing conditions detailed as per the contract, US$51.00 per net metric ton. (FOB)

Item 2: (Contract No. F-KOS-32022-N-2)
18,500 metric tons, net, in bulk, 5% less tolerance allowed, of the same as Item 1, but US$51.50 per net metric ton. (FOB)

(other docs.) (15)

1. Inspection, and Analysis certificate for plant food nutrient content and physical condition of materials in accordance with AOAC methods in quadruplicate respectively issued by General Superintendence Co. as for 88,000 metric tons of commodity Item 1, by Robert W. Hunt Co. as for 70,700 metric tons of commodity Item 1 and by Universal Testing & Superintending Co. as for commodity Item 2, stating to the effect that the commodity described herein is in conforming to the commodity description in the contract.

2. Certificate of weight in quadruplicate issued by General Superintendence Co. as for 88,000 metric tons of commodity Item 1, by Robert W. Hunt Co. as for 70,700 metric tons of commodity Item 1 and by Universal Testing & Superintending Co. as for commodity Item 2.

3. Origin certificate in duplicate issued by Korean Consul in U.S.A., certifying that the commodity invoiced is of U.S. origin.

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(expiry date) (16) March 31, 1964

Special Instructions:

1. All documents must contain the PA No. , OSROK Reference No. KDS-32002-N and Contract No. F-KDS-32022-N-1 and 32022-N-2.

2. Performance Bond: - This credit is issued subject to establishment by the beneficiary with the L/Com. bank within 10 business days after the dispatching date of this credit advice by the L/Com. bank to the beneficiary of performance bond in favor of Office of Supply, Government of the Republic of Korea (OSROK) in the form of irrevocable clean credit, cash, certified check or bank guarantee equal to 5 percent of this credit amount.

The performance bond should expire in Seoul, Korea 3 months after the latest shipping date of the relative letter of credit or any extension thereof (plus the number of calendar days allowed for an additional shipping date stipulated in Special Instructions hereunder), and shall be reduced to one percent (1%) of contract value as specified in the additional requirement for supplier's performance bond hereinafter, upon negotiation of the final shipping documents conforming to the terms of this credit.

Satisfactory completion or failure in such establishment shall be promptly cabled to The Bank of Korea, Seoul, however, at any event not later than the first business day following the time limitation of presentation of the performance bond.

Original of the performance bond shall be kept by the L/Com. bank and two non-negotiable copies shall be airmailed to The Bank of Korea, Seoul.

The Performance bond shall be available for payment against simple receipt accompanied by OSROK's statement certifying that the beneficiary (supplier) has not complied with the terms of Contract No. F-KDS-32022-N-1 and 32022-N-2.

Additional Requirement for Supplier's Performance Bond: - The amount of US$90,464.50 out of the total performance bond, shall be valid until further two (2) months in addition to 3 months after the latest shipping date or any extension thereof and shall be available for payment against simple receipt accompanied by OSROK's statement certifying that "drawing under this performance bond has been necessitated for collection of demurrage incurred at the loading port", and shall be cancelled upon OSROK's instruction or on its expiry date, whichever may be sooner. However, in the event no demurrage has been incurred and it has been evidenced by the laytime calculation presented by the supplier to the L/Com bank, it will be automatically released upon negotiation of the final shipping documents conforming to the contract.

3. Shipment must be effected on U.S. flag liner vessel as for 68,650 M/T of Item 1 & 2, U.S. flag tramp vessel as for 60,700 M/T of Item 1, and Korean flag tramp vessel as for 47,850 M/T of Item 1.

4. Bill of lading must have a seprate certificate issued by the shipping company stating that the vessel involved in this shipment is a liner and tramp vessel or a notation must be made on the bill of lading to this effect.

5. Bill of lading must be consigned to the Office of Supply, Government of the Republic of Korea, Seoul.

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6. The following certification of 'source' and 'origin' must be attached to or endorsed on each invoice and must be signed by the supplier or his authorized representative:
'I (We) hereby certify that the 'origin' (as defined by AID) of the commodities listed on the attached invoice or invoiced herein is as shown below, that such 'origin', as well as the 'source' shown in block 3 of AID Form 280, is included in the AID Geographic Code authorized in the procurement document under which this shipment is made, and that this information is true and correct in all respects'.

7. The beneficiary's invoice must contain the following statement:
'The undersigned hereby certifies that five non-negotiable copies of the following documents have been airmailed direct to the Office of Supply, Government of the Republic of Korea, Seoul, Korea, Attn.: Bureau of Foreign Procurement:

a) Ocean bill of lading
b) Detailed invoice
c) Weight, Inspection and Analysis certificate.
d) Copies of cablegram addressed to OSROK, containing OSROK Reference No., PA No., Contract No., amount invoiced, brief description of goods shipped, name of vessel, loading port and estimated departure and arrival date.
e) Laytime Calculation and Statement of Fact effected at the port of loading, if applicable.

J. HENRY SCHRODER BANKING CORPORATION

57 Broadway, New York 15, N.Y.

IRREVOCABLE CONFIRMED CREDIT No. C-200983/AID-6325770

Date September 6, 1963

Concentrated Phosphate Export
Association, Inc.,
420 Lexington Avenue
New York 17, New York

Supplementing our letter of Sept. 3, 1963

RE: AID PA 489-901-356-3009
OSROK Reference No. KOS-34004-N.

Dear Sirs:

We are instructed by Bank of Korea, Seoul, Korea

to inform you that they have established their irrevocable credit No. AID-6325770 in your favor for account of Office of Supply, Government of the Republic of Korea, Seoul, Korea.
for a sum or sums not exceeding a total of $9,046,450.00
(NINE MILLION FORTY SIX THOUSAND FOUR HUNDRED FIFTY U.S. DOLLARS)
available by your drafts drawn on us,
at ----------sight for -full- invoice value of the merchandise described below and accompanied by: /signed,
Commercial invoices ,in seven copies, describing merchandise as

Code: 235

Item 1: (Contract No. F-KOS-32022-N-1)
156,200 - 158,700 metric tons, net, in bulk, 5% less tolerance allowed
& 11/21/63 of Triple Superphosphate commercial granular 46% P2O5 APA
2,500 min. guranteed according to AOAC Method, fully cured, solid
& 4/24/64 form, chemical fertilizer conforming to US Federal
Specifications in a dry, free flowing conditions detailed
as per the contract, at $51.00 per net metric ton. (FOB)
17,010 MT Cancelled & 2/24/64 ok SS Dong Hae Pioneer

Item 2: (Contract No. F-KOS-32022-N-2)
18,500 metric tons, net, in bu[illegible] less tolerance allowed
of the same as Item 1, but at $51.50 per net metric ton.(FOB)

Invoices must indicate the Procurement Authorization Number and the gross tonnage (long tons) of the cargoes, the gross sales price, net sales price (after deducting all discounts and purchasing agent's commissions applicable) and basis of delivery.

Invoices must also contain your statement that

Drafts must be drawn and presented at our office on or before MARCH 31, 1964.
Each draft drawn hereunder must specifically mention the number and date of this letter of credit. The draft amount must be endorsed on the reverse side of this instrument. (continued on Page 2)
Our correspondent engages with you that all drafts drawn under and in compliance with the terms of this credit will be duly honoged on delivery of documents as specified. We confirm the credit and thereby undertake that all drafts drawn and duly presented as above specified will be duly honored by us.

Unless otherwise expressly stated, this credit is subject to the "Uniform Customs and Practice for Commercial Documentary Credits," fixed by the Thirteenth Congress of the International Chamber of Commerce. For the definitions of certain export quotations reference is made to the general descriptions of those terms included in the "Revised American Foreign Trade Definitions, 1941".

ps

Very truly yours,

Authorized Signature

Authorized Signature

(Page 2 L/C No. C-200983/AID-632577)

a) AID labeling requirements have been complied with, and
b) one copy of the invoice and one non-negotiable copy of the bill of lading were airmailed directly to the AID - Controller Representative, Office of Economic Coordinator, A.P.O. 301, c/o Postmaster, San Francisco, California.

Invoices must also contain your following statement:
"The undersigned hereby certifies that five non-negotiable copies of the following documents have been airmailed direct to the Office of Supply, Government of the Republic of Korea, Seoul, Korea, Attn: Bureau of Foreign Procurement:

a) ocean bill of lading
b) Detailed invoice -
c) Weight, Inspection and Analysis certificate.
d) Copies of cablegram addressed to OSROK, containing OSROK Reference No., PA No., Contract No., amount invoiced, brief description of goods shipped, name of vessel, loading port and estimated departure and arrival date.
e) Laytime Calculation and Statement of Fact effected at the port of loading, if applicable.

The following certification on 'source' and 'origin' must be attached to or endorsed on each invoice and must be manually signed by the supplier or his authorized representative:

I(We) hereby certify that the 'origin' (as defined by AID) of the Commodities listed on the attached invoice or invoiced herein is as shown below, that such 'origin', as well as the 'source' shown in Block 3 of AID Form 280, is included in the AID Geographic Code authorized in the Procurement document under which this shipment is made, and that this information is true and correct in all respects.

Origin of Commodites _____

Signed _____ Date _____

Title _____

OTHER DOCUMENTS:

Inspection and Analysis Certificate for plant food nutrient content and physical condition of materials in accordance with AOAC

(continued on Page 3)

J. HENRY SCHRODER BANKING CORPORATION

Authorized Signature

Authorizdd Signature

ps

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(Page 3 L/C No. C-200983/AID-632577)

methods in quintuplicate, stating that the commodity described therein is in conformity to the commodity description of the contract, and that inspection has been made of physical condition of the material, issued by the following inspection services:

Item 1: For 88,000 metric tons by General Superintendence Co.
For 70,700 metric tons by Robert W. Hunt Co.

Item 2: by Universal Testing Superintending Co.

The inspection service shall certify as to the weights delivered to the ocean carrier.

Certificate of Origin in duplicate, issued by the Korean Consul in U.S.A. certifying that the commodity invoiced is of U.S. origin.

Certificate of Weight in quadruplicate issued by the following inspection services:

Item 1: For 88,000 metric tons by General Superintendence Co.
For 70,700 (159,700) metric tons by Robert W. Hunt Co.

Item 2: by Universal Testing Superintending Co. (15,100)

Full set clean "onboard" ocean bills of lading consigned to Office of Supply, Government of the Republic of Korea, Seoul, marked "Notify Office of Supply, Government of the Republic of Korea, Seoul" and "Freight prepaid", evidencing shipment from Tampa, Range, Florida to one safe port of Korea as follows: Charter Party Bill of Lading acceptable

For item 1: at buyers call during the period from August 1, 1963 to December 31, 1963.

For item 2: at buyers call during the period from August 1, 1963 to February 29, 1964.

Shipment of 68,650 metric tons of item 1 and 2 must be effected on U.S. flag line vessel, 60,700 metric tons of item 1 on U.S. flag tramp vessel, 47,850 metric tons of item 1 on Korean flag tramp vessel. /and

Bills of lading must be accompanied by a Liner Certificate or a Tramp vessel Certificate or a notation must be made on the bills of

(continued on Page 4)

J. HENRY SCHRODER BANKING CORPORATION

Authorized Signature

Authorized Signature

ps

lading to this effect. The nationality of the vessel must appear on the bills of lading. The onboard notation on the bills of lading must be dated.

Two copies of Laytime Calculation and statement of Fact effected at the port of loading.

Partial shipments permitted.

Transshipment prohibited.

Insurance is to be effected by the buyers.

AID DOCUMENTS:

In addition to the documents stipulated above, the following AID documents must also be presented.

Signed copy of the commercial invoice, marked "Paid".

Signed copy of the weight, Inspection and Analysis Certificate.

Suppliers' Certificate in triplicate AID Form 280 (7-55) original signed by suppliers for the FOB value of the merchandise with invoice-and-contract abstract on reverse side, completely executed in English.

One non-negotiable copy or photostat of the ocean bill of lading.

All documents must show the relative PA and contract numbers, and OSROK's reference number KOS-34004-N.

PERFORMANCE BOND:

This credit is issued subject to the establishment with us, within 10 business days from the date of this credit, of a performance bond in favor of Office of Supply, Government of the Republic of Korea (OSROK) in the form of an irrevocable clean credit, cash, certified check or bank guarantee equal to 5% of this credit amount.

The performance bond shall expire in Seoul, Korea 3 (three) months after the latest shipping date stipulated in this credit, or any extension thereof and shall be reduced to 1% (one percent) of contract amount (as specified hereinafter) upon negotiation of the final shipping documents conforming to the terms of this credit.

(continued on Page 5)

J. HENRY SCHRODER BANKING CORPORATION

Authorized Signature

Authorized Signature

PS

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(Page 5 L/C No. C-200983/AID-612577-C)

The performance bond shall be available for payment against simple receipt accompanied by OSROK's statement certifying that you have not complied with the terms of Contract No. F-KOR-32022-M and 32022-M-2.

Out of the total performance bond, the amount of $90,464.50 (NINETY THOUSAND FOUR HUNDRED SIXTY FOUR AND 50/100 U.S. DOLLARS), shall be valid for a further 2 (two) months in addition to 3 months after the latest shipping date or extension thereof, and shall be available for payment against simple receipt accompanied by OSROK's statement that the drawing was necessary for the collection of demurrage incurred at the loading port. This portion shall be cancelled upon OSROK's instructions or on the expiry date, whichever may be sooner. However, in the event no demurrage has been incurred as evidenced by the laytime calculation presented to us, this portion will be automatically released upon negotiation of the final shipping documents, conforming to the terms of this credit.

This credit is subject to the "Uniform Customs and Practice for Documentary Credits" (1962 Revision), International Chamber of Commerce Brochure No. 222.

Very truly yours,

J. HENRY SCHRODER BANKING CORPORATION

Authorized Signature

Authorized Signature

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J. HEN. / SCHRODER BANKING CORPOR..TION
57 Broadway New York 15 N.Y.

W.S.R.
DEC 3 - 1963

MAIL TO

Concentrated Phosphate Export Association, Inc.
420 Lexington Avenue
New York 17, N.Y.

Amendment No. 1

DATE December 2, 1963

LETTER OF CREDIT NUMBER: C-200983/AID-632577 G

LETTER OF CREDIT DATE: Sept. 6, 1963

ADVISED THROUGH

This credit is amended as follows in accordance with instructions received from our client for account of: Office of Supply, Government of the Republic of Korea, Seoul, Korea

Charter Party Bills of Lading acceptable.

OUR CLIENT

The Bank of Korea
Seoul, Korea

All other conditions remain unchanged.

Authorized Signature

Authorized Signature

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J. HEN...r SCHRODER BANKING CORPO...TION
57 Broadway, New York 15, N.Y.

Amendment No. 2 — DATE Dec. 10, 1963

MAIL TO
Concentrated Phosphate Export Association Inc.,
420 Lexington Avenue
New York, 17, N.Y.

LETTER OF CREDIT NUMBER
632577-G
C-200983/AID/

LETTER OF CREDIT DATE
Sept. 6, 1963

ADVISED THROUGH

This credit is amended as follows in accordance with instructions received from our client for account of: Office of Supply, Goverment of the Republic of Korea, Seoul,

1. Latest shipping dates for item 1 (one) now read as follows:

December 31, 1963 for 139650 metric tons

February 29, 1964 for 19050 metric tons per S/S DONGHAE ✓
and M/S KOREA ✓

Validity remains unchanged.

All other conditions remain unchanged.

OUR CLIENT

The Bank of Korea
Seoul, Korea

Authorized Signature

Authorized Signature

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J. HENRY SCHRODER BANKING CORPORATION
57 Broadway New York 15 N.Y.

MAIL TO

Amendment No. 3

DATE December 30, 1963

Concentrated Phosphate Export Association Inc.
420 Lexington Avenue
New York, 17, N.Y.

LETTER OF CREDIT NUMBER
C-200983/AID/632577-G

LETTER OF CREDIT DATE
Sept. 6 1963

ADVISED THROUGH
W.J.R.
JAN 2 1964

This credit is amended as follows in accordance with instructions received from our client for account of: office of Supply, Government of the Republic of Korea, Seoul

Latest shipping date for item one is changed to read as follows:

DECEMBER 31, 1963 for 156200 metric tons
FEBRUARY 29, 1964 for 2500 metric tons

WE CONFIRM OUR TELEPHONE CONVERSATION

OUR CLIENT
The Bank of Korea
Seoul, Korea

All other conditions remain unchanged.

Authorized Signature

Authorized Signature

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J. HENRY SCHRODER BANKING CORPORATION
57 Broadway New York 15 N.Y.

MAIL TO

Amendment No. 4 — DATE Feb. 19, 1964

Concentrated Phosphate Export Association Inc.,
420 Lexington Avenue
New York 17, N.Y.

LETTER OF CREDIT NUMBER: C200983/AID/6325770

LETTER OF CREDIT DATE: Sept. 6, 1963

ADVISED THROUGH

This credit is amended as follows in accordance with instructions received from our client for account of: Office of Supply, Government of the Republic of Korea, Seoul

1. Relating to 2500 metric tons of item 1 only, latest shipping date extended to March 20, 1964.
2. Relating to 11,099 metric tons of item 2 only, latest shipping date extended to February 29, 1964.
3. Relating to 7401 metric tons of item 2 only, latest shipping date extended to March 20, 1964.
4. Validity extended to April 20, 1964.

W.J.R.
FEB 20 1964

OUR CLIENT
The Bank of Korea,
Seoul, Korea

All other conditions remain unchanged.

Authorized Signature

Authorized Signature

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EXHIBIT 27

c/o American Foreign Insurance Association, 161 William Street, New York 38, N. Y.

PERFORMANCE BOND BOND NO. XS-4405

Date Bond Executed - September 6, 1963

Principal: Concentrated Phosphate Export Association Inc.
420 Lexington Avenue, New York, New York

Surety: Hartford Accident and Indemnity Company
c/o American Foreign Insurance Association
161 William Street, New York, N. Y.

Penal Sum of Bond: Four Hundred Fifty Two Thousand Three Hundred Twenty Two and 50/100 ($452,322.50) Dollars

Contract No: F-Kos 32022-N-1
32022-N-2

Date of Contract - August 17, 1963

KNOW ALL MEN BY THESE PRESENTS, That we, the PRINCIPAL AND SURETY ABOVE named, are held and firmly bound unto Office of Supply Government of the Republic of Korea, Seoul, Korea, hereinafter called the Obligee, in the penal sum of the amount stated above, for the payment of which sum well and truly to be made by us, in total or in part, according to Obligee's instructions and upon Obligee's demands, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the Principal entered into a certain contract with the Obligee, numbered and dated as shown above and hereto attached:

NOW, THEREFORE, if the Principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Obligee, with or without notice to the Surety, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of any and all duly authorized amendments, or modifications of said contract that may hereafter be made, notice of which amendments or modifications to the surety being waived, then this obligation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, the above bounden parties have executed this instrument on the date indicated above, the corporate seal of each corporate party being hereto affixed and these presents duly signed by its authorized representative pursuant to authority of its governing body.

CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC.

By: _____

HARTFORD ACCIDENT AND INDEMNITY COMPANY

By: _____
Ronald A. Kosciuk
Attorney in fact

[295] EXHIBIT 28

Standard Form No. 1034
7 GAO 5000
1034-108

PUBLIC VOUCHER FOR PURCHASES AND SERVICES OTHER THAN PERSONAL

(Use continuation sheet(s) if necessary)

VOUCHER NO. 450-1312

U. S. AGENCY FOR INTERNATIONAL DEVELOPMENT
(Department, bureau, or establishment)

Voucher prepared at NEW YORK, N.Y. NOVEMBER 27, 1963
(City, place and date)

Payee's Account No. _____ Discount Terms _____

Payee J. Henry Schroder Banking Corporation, acting for and on behalf of The Government of Republic of Korea

(Address) 57 Broadway, New York, N.Y.

PAID BY
TREASURY DEPARTMENT
DIVISION OF DISBURSEMENT
DEC 3 1963
SYMBOL 6020
NEW YORK, N.Y.

Contract No. _____ Shipped from _____ Date _____ Req. No. _____ Weight _____ Date _____ Invoice Rec'd _____ Gov't B/L No. _____

No. and Date of Order	Date of Delivery or Service	ARTICLES OR SERVICES (Enter description, item number of contract or Federal supply schedule, and other information deemed necessary)	Quantity	UNIT PRICE Cost	UNIT PRICE Per	AMOUNT
		AID PA 489-901-356-3009 Approp. 72-11x31006 Pursuant to the terms of the above-mentioned Procurement Authorization and the Mutual Security Act of 1954, reimbursemet is hereby claimed in the total amount indicated. Letter of Credit No. C-200983/AID632577-G We certify that the above bill is correct and just; that payment therefor has not been received. J. Henry Schroder Banking Corporation, acting for and on behalf of the Government of Korea				
		FOB Vessel Tampa, Fla.				$1,569,537.40
		TOTAL				$1,569,537.40

Authorized Signature

(PAYEE MUST NOT USE THIS SPACE)

PAYMENT:
COMPLETE ☐
PARTIAL ☐
FINAL ☐
PROGRESS ☐
ADVANCE ☐

DIFFERENCES _____

Amount verified; correct for _____
(Signature or initials)

† Approved for _____ =$ _____
By _____
Title _____
Exchange rate _____ =$1.00

Pursuant to authority vested in me, I certify that this voucher is correct and proper for payment.

† _____
(Authorized Certifying Officer) (Date)

THE REVERSE OF THIS FORM MUST BE ENDORSED WHEN PURCHASES ARE MADE ON SERVICES RENDERED WITHOUT WRITTEN AGREEMENT IN ARE FORM

ACCOUNTING CLASSIFICATION (Appropriation Symbol and Subhead, Allotment Symbol, and/or other Classification optional)

We wish to purchase check.

PRICE REVIEWED
(Invoices not reviewed identified below.)
EOP 10-31-64
Initials

VOUCHER EXAMINED
RN 12/13/63
Initials Date

Paid by
Check No. _____
Check No. _____
Initials
Cash, $ _____, on _____, 19____

Payee _____
Per _____
Title _____

* Where used in foreign countries, insert name of currency of country in which paid.

† If the ability to certify and authority to approve are combined in one person, one signature only is necessary; otherwise the approving officer will sign in the box below "Approved for $ _____", and over his official title.

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CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC.

480 LEXINGTON AVENUE
NEW YORK, N. Y. 10017

We certify that payment has been made in the amount shown on this invoice

J. HENRY SCHRODER BANKING CORPORATION

Authorized Signature

Telephone: MU 6-4415
MU 6-4416

Cables: PHOSEXPO

INVOICE No. 195

11/8/63

CONTRACT NO. FKOS 32022 N 1

F.O.B.	C.I.F.	Vessel	Date	Destination
VESSEL, TAMPA, FLA.		ALCOA MARKETER	11/8/63	KOREA

Sold to

OFFICE OF SUPPLY
GOVERNMENT OF REPUBLIC OF KOREA
SEOUL, KOREA

OSROK REFERENCE: KOS 34004 N

Shipped to

SAME

KOREA
PA/PIO/AP NO. 439-901-[illegible]-2001.
INVITATION NO. AID - 30[illegible] S
CONTRACT NO. FKOS 32022 N-1

Terms	Packing
LETTER OF CREDIT	BULK

Tons	Material	Price	Amount
9589.4039 METRIC (9437.8571 LONG)	COMMERCIAL Triple Superphosphate GRANULAR, 46% P_2O_5 APA MINIMUM GUARANTEED ACCORDING TO AOAC METHODS, FULLY CURED, SOLID FORM, CHEMICAL FERTILIZER CONFORMING TO U.S. FEDERAL SPECIFICATIONS IN A DRY FREE FLOWING DiAmmonium Phosphate CONDITION DETAILED AS PER THE CONTRACT. Phosphoric Acid	51.00 PER MT	$489,039.60

PAID

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PAGE 2

INVOICE NO. 195

A. AID LABELING REQUIREMENTS HAVE BEEN COMPLIED WITH, AND
B. ONE COPY OF INVOICE AND ONE COPY OF NON-NEGOTIABLE BILL OF LADING WERE AIRMAILED TO AID CONTROLLER REPRESENTATIVE, OFFICE ECONOMIC COORDINATOR, APO 501 c/o POSTMASTER, SAN FRANCISCO, CALIFORNIA

I HEREBY CERTIFY THAT THE ORIGIN (AS DEFINED BY AID) OF THE COMMODITY LISTED ON THE INVOICE IS AS SHOWN BELOW, THAT SUCH 'ORIGIN' AS WELL AS THE 'SOURCE' SHOWN IN BLOCK 3 OF AID FORM 282, IS INCLUDED IN THE AID GEOGRAPHIC CODE AUTHORIZED IN THE PROCUREMENT DOCUMENT UNDER WHICH THIS SHIPMENT IS MADE, THAT THIS INFORMATION IS TRUE AND CORRECT IN ALL RESPECTS.

ORIGIN OF COMMODITY: U.S.A.
DATE: 11/8/63
SIGNED:

SECRETARY

THE UNDERSIGNED HEREBY CERTIFIES THAT THE [illegible] THE FOLLOWING DOCUMENTS HAVE BEEN AIRMAILED DIRECT TO THE OFFICE OF SUPPLY, GOVERNMENT OF THE REPUBLIC OF KOREA, SEOUL, KOREA, ATTN BUREAU OF FOREIGN ASSISTANCE:

A. ORIGINAL BILL OF LADING
B. [illegible]
C. [illegible]
D. [illegible] ADDITIONAL INSURANCE CERTIFICATE
COVER REFERENCE NO. PA NO CONTRACT NO. AMOUNT PAYABLE, SHIP DESCRIPTION OF GOODS SHIPPED, NAME OF VESSEL, LOADING PORT AND ESTIMATED DEPARTURE AND ARRIVAL DATE
E. LAYTIME CALCULATION AND STATEMENT OF FACT EFFECTED AT THE PORT OF [illegible] APPLICABLE

CONCENTRATED PHOSPHATE EXPORT ASSOCIATION

[298]

AID-590 (5-63) BACK

INVOICE AND CONTRACT ABSTRACT

INVOICE INFORMATION—THIS SPACE FOR AID USE ONLY

1. PROCUREMENT AUTHORIZATION OR PROJECT IMPLEMENTATION ORDER NO.	2. INV. AMT. AFTER DISCOUNT	3. SOURCE COUNTRY	4. GROSS LONG TONS
PA 489-901-356-3009	$489,059.60	USA	9437.8571 (9438)

5. VESSEL—NAME	BULK	BERTH	TANKER	6. FLAG	7. PORT OF EXIT	8. DATE S/A
ALCOA MARKETER	X			USA	TAMPA, FLA.	11/5/63

9. COMMODITY OR SERVICE—ID ENGLISH	10. AID CODE	11. INVOICE DATE	12. QUANTITY	13. QUANTITY UNIT	14. UNIT PRICE	15. SHIPPING TERMS
TRIPLE SUPERPHOSPHATE	2353	11/8/63	9589.4089	METRIC	51.00	FOB

16. SUPPLIER'S NAME, ADDRESS, AND SOCIAL SECURITY EMPLOYER NO.	17. CLASS OF SUPPLIER (CHECK ONE)	18. IMPORTER'S NAME AND ADDRESS
13-1065774 CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC. 420 LEXINGTON AVE., NY., NY.	X MANUFACTURER, PRODUCER, OR PROCESSOR — PRIMARY SELLER MERCHANT EXPORTER OR OTHER—SECONDARY SELLER	OFFICE OF SUPPLY GOVN'T OF REPUBLIC OF KOREA SEOUL, KOREA

INFORMATION AS TO AGENTS' COMMISSIONS, DOMESTIC AND FOREIGN

20. NAMES OF AGENTS	21. ADDRESSES	22. COMMISSIONS IN INVOICE AMT. —PAID OR TO BE PAID
TAIPYONG COMPANY, LTD.	SEOUL, KOREA	• XXXXXX 1198.57
KUNSUL COMPANY, LTD.	SEOUL, KOREA	• XXXXXX 1198.58

CONTRACT AND PRICE INFORMATION

23. CONTRACT DATE	24. CONTRACT SHIPPING TERMS	25. CONTRACT AMT.	26. CONTRACT QUANTITY	27. CONTRACT UNIT PRICE	28. DOMESTIC UNIT PRICE
8/17/63	FOB	$9,046,450.	177,200 MT	51.00	51.40

29. SPECIFY HERE ITEMS AND AMOUNTS THAT WILL ACCOUNT FOR ANY DIFFERENCES BETWEEN CONTRACT, INVOICE, AND DOMESTIC UNIT PRICES.

CONTRACT NO. FKOS 32022N1 AND OSROK'S REFERENCE NUMBER KOS 34004-N

30. SEND INTERNAL NUMBER, AID-10-61

INSTRUCTIONS (Continued)

If supplier does not arrange for ocean shipment, Blocks 5 through 8 should remain blank. In Block 9, insert the exact description (in English) for multi-commodity invoices insert the descriptive words commonly employed within the industry. If AID Commodity Code is unknown, Block 10 may be left blank. On a Form AID-298 prepared for a multiple item invoice, the term "Various" may be inserted in Blocks 13 and 14. Blocks 15 and 23 refer to "FAS and CIF" etc. In Block 16 list supplier's Social Security Employer Number, which AID needs to determine the participation of small business suppliers in the program.

Block 17 should indicate in Block 17 whether (1) manufacturer, producer, or processor of the commodity; or (2) merchant exporter or other secondary seller.

INFORMATION AS TO AGENTS' COMMISSIONS, DOMESTIC AND FOREIGN—Where the amount shown in Block 2 includes a commission paid or to be paid to agent of supplier, the actual amount of such commission in dollars and cents must be entered in Block 21. Write "NONE" in Block 21 if no commissions are involved.

CONTRACT AND PRICE INFORMATION—If there is no formal contract specifically covering the shipment, insert date of confirmation of order in Block 22. Block 27 is producer, manufacturer, or processor's price. In accounting for difference between contract, invoice and domestic unit prices, Block 28, describe and show the effect of: (1) escalator clauses or extras; (2) if the selling price is established on a date other than the contract date, the price-fixing date; (3) ocean freight charges; (4) ocean marine insurance premiums, if any; (5) export differential, if any.

SPECIAL INSTRUCTIONS FOR OCEAN FREIGHT OTHER THAN C&F AND CIF TRANSACTIONS: Omit Block 3. Leave Block 4 blank if quantity is in long tons; otherwise fill it in. In Block 9, show "Ocean Freight" and in Block 10 use "9500" for Code. Blocks 11, 12, 13, and 14, are taken from the freight bill. In Block 15 show "Collect" or "Prepaid." Omit Block 17. Give full information as to commissions paid in Blocks 19, 20, and 21. Omit Blocks 22 through 27 but explain any differences between invoice price and price stated in charter party or contract of affreightment in Block 28.

[299]

SUPPLIER'S CERTIFICATE

The supplier hereby acknowledges notice that the sum indicated on the accompanying invoice as claimed to be due and owing under the terms of the underlying contract is to be paid out of funds made available by the United States under the Mutual Security Act, as in effect on the date hereof, and subject to AID Regulation 1, as amended, and further certifies and agrees with the Administrator of the Agency for International Development (AID) as follows:

(1) The supplier is entitled under said contract to the payment of the sum claimed and he will promptly make appropriate refund to AID upon request of the Administrator in the event of his non-performance, in whole or in part, under said contract, or for any breach by him of the terms of this certificate.

(2) Adjustment refunds or credits arising out of the terms of the contract or the customs of the trade shall be made direct to the buyer, but the supplier will promptly notify the Administrator concerning any such adjustment refunds or credits, so that the Administrator may obtain appropriate refund from the cooperating country. If an adjustment results in an additional charge to the purchaser, the supplier will promptly notify the Administrator of such additional charge.

(3) If the said contract is on a C&F (cost and freight) or a CIF (cost, insurance and freight) basis, the supplier is entitled to payment, under AID Regulation 1, as amended, of any ocean freight charges included in the sum claimed. The supplier is entitled to payment, under AID Regulation 1, as amended, of any ocean marine insurance premium charges included in the sum claimed.

(4) The supplier is the producer, manufacturer, processor, or exporter of, or a regular dealer in, the commodity, or furnishes the service covered by said contract and has not employed any person to obtain said contract under any agreement for a commission, percentage, or contingent fee, except to the extent, if any, of the payment of a commission to a bona fide established commercial or selling agent employed by the supplier as disclosed on the reverse of this form."

(5) The supplier has not given or received and will not give or receive by way of side payment, "kickbacks," or otherwise, any benefit in connection with said contract except as is disclosed on the reverse of this form, or as is the result of the adjustments referred to in Paragraph 2.

(6) If the supplier is the producer, manufacturer or processor of a commodity, said contract is not a cost plus-a-percentage-of-cost contract.

(7) The supplier further certifies, on the basis of information obtained from such sources as are available to him, that to the best of his information and belief the purchase price is no higher than the market price (which shall mean the export market price, where such a price is customary in the trade) prevailing in the United States at the time of purchase, adjusted for differences in the cost of transportation to destination, quality, and terms of payment.

(8) The supplier further certifies that (a) on the basis of information obtained from such sources as are available to him, and to the best of his information and belief, the purchase price is no higher than the price solicited in accordance with the applicable price provisions of AID Regulation 1, as amended, and he has complied with the rules provided therein; and (b) he has allowed all discounts, including discounts for quantity purchased and prompt payment, customarily allowed his other customers similarly situated.

(9) If the supplier furnishes only a service, he shall not be deemed to certify to paragraphs 7 and 8 but instead certifies that the rate indicated on the reverse of this form for the service rendered does not exceed the prevailing rate, if any, for similar services, or the rate paid to the supplier for similar services by other customers similarly situated.

(10) The supplier has filled in the applicable portions of the invoice-and-contract abstract on the reverse hereof, certifies to the correctness of the information shown therein, and will furnish promptly to the Administrator at his request such additional information in such form as the Administrator may require concerning prices and other circumstances of the purchase.

11/12/63
Date

Author[illegible] (See Instructions)

Title SECRETARY

NEW YORK, NEW YORK USA
(Place executed (City, State, Country))

NOTES: (a) *Any amendments, deletions of applicable provisions, or substitutions will invalidate this certificate.* (b) *False statements herein are punishable by United States law.* (c) *The word "Duplicate" must be written after signature on all signed copies other than the original.*

AID-390 (4-63) AGENCY FOR INTERNATIONAL DEVELOPMENT

GPO 863-447

(Tear off this stub after filling in form)

INSTRUCTIONS

SUPPLIER'S CERTIFICATE—A signed original and two copies of form AID-390 are to accompany each invoice for which payment is requested. Normally, ONLY the original should be signed; if for any reason copies other than the original need to be signed, they should be clearly marked "Duplicate" after the signature. Form AID-390 should be signed by a responsible official of supplier indicating capacity in which signed. Copies are not to be submitted to AID unless specifically requested. In the case of ocean freight, however, charter parties or contracts of affreightment, if any, are to accompany reimbursement documents, except for C/F and C&F transactions. See special instructions below relating to ocean freight. Other requirements of AID Regulation 1, as amended, including marking requirements, are to be complied with. This form may be obtained in limited quantities from banks holding AID Letters of Commitment, Regional Offices of the Department of Commerce, or Agency for International Development, Distribution Section, PS/GSD, Washington, D. C. 20523. Forms may be reproduced, provided the reproduction is identical in content, size and format.

INVOICE INFORMATION (on reverse side)—AID Procurement Authorization or Project Implementation Order number must be inserted in Block 1 by supplier. The amount shown in Block 2 is the net amount for which the supplier seeks payment. It must not include any commission to an importer's purchasing agent and must be net of all discounts. Commission paid or to be paid in connection with the transaction covered by this certificate to agents of supplier which are included in amounts shown in Block 2 must be described in Blocks 19, 20, and 21. In Block 3, show ocean freight as defined in § 201.1(m) of AID Regulation 1. In Block 4, show the bill of lading weight rounded to nearest whole ton, if expressed in other than long tons (ton of 2,240 pounds or 40 cubic feet to the ton.) Where

[300]

DUPLICATE

File 1017-37
Order 11-3771

No. 3167/58

Certificate of Robert W. Hunt Company, Engineers

General Offices 810 Rookery Building, Chicago 4, Ill.

November 14th, 63.

Bureau of Procurement - Office of Supply
Government of the Republic of Korea - Seoul, Korea

For account of Concentrated Phosphate Export Association, Inc.
Furnished by 420 Lexington Avenue, New York, N. Y. 10017.

We Certify the following material has been inspected, and in accordance with our opinion based upon the report of our Inspectors and our experience and judgment, has been accepted under the instructions provided.

Re: AID PA 489-901-356-3C07
SUPPLIER NO. F-K08-22022-H-1
CHROK REF. NO. RCO 31C04-K
PRIMARY CONTRACT NO. F-K08 22022-H-1-6

Certificate of Weight, Inspection and Analysis of:

9559.1037 Metric Tons net of Triple Superphosphate Granular, 46% P_2O_5 minimum, in bulk form.

The material was fully cured, free flowing, solid form, chemical fertilizer, 93% retained on #20 mesh screen and more than 5% on #6 mesh screen at time of shipment.

We selected samples, at random, during the loading of the above mentioned quantity of Triple Superphosphate for shipment aboard S/S "Alcoa Partaker" at Tampa, Florida to a Korean Port as per Bill of Lading dated November 5, 1963.

The composite samples have been analyzed by AOAC method with the following results:

Granular Triple Superphosphate - P_2O_5 available - 46.5%
46.1%
46.5%

Moisture - 2.7%
3.7%
3.3%

Continued/

[301] DUPLICATE

Vill / 1017-27
Order B-3071

New York 7, N. Y.
November 12, 1963

3167/mt
Page - 2 -

Sieve Analysis:

96.8% } Retained on #20 mesh standard sieve.
99.1%
96.7%

0.3% } Retained on #6 mesh standard sieve.
0.6%
1.3%

Ample samples were sent via Air Mail on November 4, 1963 - U.S.O.M. Korea, APO 301, San Francisco, California - Attention: TC-16 Fertilizer Adviser.

Material loaded aboard S/S "Glens Marketer" was found to be properly stowed.

As a result of inspection and above analysis, we find that the commodity covered by this Certificate was in accordance with Supplier Commodity No. 7-K6 32023-K-1, at time of inspection.

Our obligation in making this inspection and forwarding this Certificate extends only to our Client and represents our opinion on the date of inspection only.

Respectfully submitted,

Robert M. Kennedy Company

U. S. Certified Gift

[302]

DUPLICATE

File 1617-37
Order 1-3071

No. 31671-Y

# of Robert W. Hunt Company, Engineers

General Offices 8 W 0 Rector-Clinton Street Chicago 7

November 11th, 63.

For account of Bureau of Procurement - Office of Supply, Government of the Republic of Korea - Seoul, Korea

Furnished by Concentrated Phosphate Export Association, Inc. 420 Lexington Avenue, New York, N. Y. 10017.

We Certify the following material has been inspected, and in accordance with our opinion based upon the report of our Inspectors and our experience and judgment has been accepted under the instructions provided.

Re: AID NO. FA 489-901-356-3009
SUPPLIER NO. F-301-22028-X-1
CHECK REF. NO. FCI-2(CPA)
FREIGHT CONTRACT NO. AGI 22028-CT-X-6

Check weighing and measuring of

9509.1037 Metric Tons (21,140,800 lbs.) of Granular Triple Superphosphate, 46% minimum P2O5, loaded aboard the S/S "Alcoa Marketer" as per Bill of Lading, dated November 5, 1963.

Our obligation in making this inspection and forwarding this Certificate extends only to our Client and represents our opinion on the date of inspection only.

Respectfully submitted,

Robert W. Hunt Company

By: [illegible]

[303] A

ALCOA STEAMSHIP COMPANY, INC.

(SPACES IMMED. BELOW FOR SHIPPERS MEMORANDA—NOT PART OF BILL OF LADING)

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PAGE 2

FORWARDING AGENT—SHIPPERS REFERENCES
[illegible] SHIPPING COMPANY, INC. 1301 "G" STREET N.W. WASHINGTON D.C.

EXPORT DEC. No.
[illegible]

DELIVERING CARRIER TO STEAMER:
ATLANTIC COAST LINE RAILROAD COMPANY

*CAR NUMBER — REFERENCE
VARIOUS BOXCARS

*New Orleans Tolleys (not) absorbed

BILL OF LADING

NOT NEGOTIABLE UNLESS CONSIGNED "TO ORDER" (SEE CLAUSE 25)

SHIP S.S. ALCOA [illegible] AMERICAN

PIER ATLANTIC COAST LINE RAILROAD

PORT OF LOADING FLORIDA

PORT OF DISCHARGE FROM SHIP [illegible], REPUBLIC OF KOREA

STEAMSHIP CONTRACT No.

SHIPPER OFFICE OF SUPPLY, GOVERNMENT OF THE REPUBLIC OF KOREA, SEOUL, KOREA

CONSIGNEE OFFICE OF SUPPLY, GOVERNMENT OF THE REPUBLIC OF KOREA

DESTINATION OF GOODS

ADDRESS ARRIVAL NOTICE TO OFFICE OF SUPPLY, REPUBLIC OF KOREA, SEOUL, KOREA

All goods are to be transshipped or forwarded after discharge from ship See Clause 11

DESCRIPTION OF GOODS

MARKS AND NUMBERS	NO. OF PCGS.	SHIPPER'S DESCRIPTION OF CLASS AND CONTENTS OF PACKAGES	SHIPPER'S GROSS WEIGHT KILOS	SHIPPER'S GROSS WEIGHT POUNDS
NONE - BULK	ONE	LOT OF GRANULAR TRIPLE SUPERPHOSPHATE IN BULK 46 % P2O5 MINIMUM		21,110,800#
"FREE IN, OUT & TRIM AS PER CHARTER PARTY"			9437.8571	
			GROSS TONS 9589.4037	
			METRIC TONS	
"THESE COMMODITIES LICENSED BY THE U. S. FOR ULTIMATE DESTINATION SOUTH KOREA. DIVERSION CONTRARY TO U.S. LAW PROHIBITED."		REFERENCE NUMBERS: OSROK AID PA 489-901-356-3009 SUPPLIER COMMODITY NO. F-KOS-32022-N-1 OSROK REFERENCE NO. KOS-3400L-N FREIGHT CONTRACT NO. F-KOS-32023-GT-N-6	LOADED ONBOARD CLEAN TAMPA, FLORIDA NOV. 5, 1963 LYKES BROS SS CO INC. BY	
"FREIGHT PREPAID"		"THIS IS A UNITED STATES PRIVATELY OWNED COMMERCIAL TRAMP VESSEL."		
CHARTER PARTY DATED AUGUST 2[illegible], 1963 AT NEW YORK APPLICABLE ON THIS BILL OF LADING.				
		SHIPPERS: DO NOT WRITE BELOW THIS LINE.		

(CONTINUED FROM OVERPAGE)

30. Specified dock discharge: If the Carrier makes a special agreement, whether by stamp hereon or otherwise, to deliver the goods hereby receipted for at a specified dock or wharf at the port of discharge, such agreement shall be construed to require the Carrier to make delivery at such specified dock or wharf only if, in the sole judgment of the Master, the ship can safely enter under her own power, proceed to, lie at, and return from said dock or wharf always afloat at any time or tide, and only if such dock or wharf is available on the ship's arrival. Immediately the ship is ready to discharge the goods. In the event such specified dock or wharf is unavailable as above provided, the goods may be discharged at or onto any wharf, craft or place that the Carrier may select. All other provisions of this bill of lading shall apply whether the goods are discharged at a specified dock or wharf or elsewhere.

31. All agreements or freight contracts for the shipment of the goods are superseded by this bill of lading, and all its terms, whether written, typed, stamped, or printed, are accepted and agreed by the shipper to be binding as fully as if signed by the shipper. Any local customs or privileges to the contrary notwithstanding. Nothing in this bill of lading shall operate to limit or deprive the Carrier of any statutory protection or exemption from or limitation of liability. If required by the Carrier, one signed bill of lading duly endorsed must be surrendered by the owner of the cargo at the port of discharge in exchange for delivery order. None of the terms of this bill of lading shall be deemed to have been waived by the Carrier unless by express waiver signed by a duly authorized agent of the Carrier.

32. The ship, port of loading, shipper, consignee, addresses of arrival notice, port of discharge and destination of the goods mentioned in the clauses and conditions of this Bill of Lading are as follows:

33. AND FINALLY, that in accepting this bill of lading, the shipper, owner and consignee of the goods and holder of this bill of lading agree to be bound by all the provisions on this page and overpage, whether written, printed, stamped or stamped, as fully as if signed by all of them.

WHEN FREIGHT CHARGES DO NOT APPEAR ON THIS BILL OF LADING AND "FREIGHT BILL" (FORM 280) IS ATTACHED HERETO, SAID FREIGHT BILL IS MADE A PART OF THIS BILL OF LADING AND INCORPORATED HEREIN BY REFERENCE.

IN WITNESS WHEREOF, the master or agent of the said vessel has signed 3 bills of lading, all of this tenor and date, and if one is accomplished, the others shall be void.

ALCOA STEAMSHIP COMPANY, INC. As Agents for the Master
LYKES BROS. STEAMSHIP CO., INC., Agents

By [signature]

DATED AT TAMPA, FLORIDA NOVEMBER 5, 1963

B/L No. ORIGINAL (1) Mo. Day Yr.

ITEM	PAYABLE BASIS WEIGHT	CUBIC FEET	RATE	FREIGHT
	9509.4037	METRIC TONS		
1			$11.50	
2			P.T.	
3			METRIC	
4			TON	$ 238,960.40
5				
HEAVY LIFT AND EXTRA LENGTH CHARGES				
SURCHARGES AND/OR SERVICE FEE				
TOTAL VESSEL FREIGHT				$ 238,960.40
MISCELLANEOUS CHARGES				
TOTAL MISCELLANEOUS CHARGES				
TOTAL FREIGHT AND CHARGES (U.S. CURRENCY)				$ 238,960.40

[304]

CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC.

480 LEXINGTON AVENUE
NEW YORK, N. Y. 10017

Telephone: MU 8-4415
MU 8-4416

Cable: PHOSEXPO

INVOICE

Date: 11/12/63 No. 196

Cont. ACT NO. FKOS 32022 N 1

F.O.B.	C.I.F.	Vessel	Date	Destination
VESSEL, TAMPA, FLA.		"HELEN H"	11/8/63	KOREA

Sold to:
OFFICE OF SUPPLY
GOVERNMENT OF REPUBLIC OF KOREA
SEOUL, KOREA

OSROK REFERENCE: KOS 34004 N

Shipped to:
SAME.

KOREA
PA/PIO/AP NO. 489-901-358-3009
INVITATION NO. AID - 3037 N
CONTRACT NO. FKOS 32022 N-1

Terms	Packing
LETTER OF CREDIT	BULK

Tons	Material	Price	Amount
31,109.839 METRIC (30,851.0267) LONG	COMMERCIAL Triple Superphosphate GRANULAR, 46% P_2O_5 APA MINIMUM GUARANTEED ACCORDING TO AOAC METHODS, FULLY CURED, SOLID FORM, CHEMICAL FERTILIZER CONFORMING TO U.S. FEDERAL SPECIFICATIONS IN A DRY FREE FLOWING DiAmmonium Phosphate CONDITION DETAILED AS PER THE CONTRACT.	51.00 PER MT	$1,030,477.00

Phosphoric Acid

To certify that payment has been made in the amount shown on this invoice

J. HENRY SCHRODER BANKING CORPORATION

Authorized Signature

Invoice No. 196

A. AID LAYDAYS REQUIREMENTS HAVE BEEN COMPLIED WITH, AND
B. ONE COPY OF INVOICE AND ONE COPY OF NON-NEGOTIABLE BILL OF LADING WERE ADDRESSED TO AID COMMODITY REQUIREMENTS, OFFICE ECONOMIC COORDINATOR, APO 201 c/o POSTMASTER, SAN FRANCISCO, CALIFORNIA.

I HEREBY CERTIFY THAT THE ORIGIN (AS DEFINED BY AID) OF THE COMMODITY LISTED ON THIS INVOICE IS AS SHOWN HEREON, THAT CODE 'ORIGIN' AS WELL AS THE 'SOURCE' SHOWN IN BLOCK 5 OF AID FORM 282, IS INCLUDED IN THE AID COMMODITY CODE AUTHORIZED IN THE PROCUREMENT DOCUMENT UNDER WHICH THIS SHIPMENT IS MADE, THAT THIS DESIGNATION IS TRUE AND CORRECT IN ALL RESPECTS.

ORIGIN OF COMMODITY: U.S.A.
DATE: 11/8/62
SIGNED:

SECRETARY

THE UNDERSIGNED HEREBY CERTIFIES THAT FIVE NON-NEGOTIABLE COPIES OF THE FOLLOWING DOCUMENTS HAVE BEEN MAILED DIRECT TO THE OFFICE OF SUPPLY, GOVERNMENT OF THE REPUBLIC OF KOREA, SEOUL, KOREA, ATTN: BUREAU OF FOREIGN PROCUREMENT:

A. OCEAN BILL OF LADING
B. LATAMAR INVOICE
C. WEIGHT, INSPECTION AND ANALYSIS CERTIFICATE
D. COPIES OF LATAMAR ADDRESSED TO OFFICE, CONTAINING CHECK REFERENCE NO., FA NO., CONTRACT NO., AMOUNT INVOICED, SHIP DESCRIPTION OF CARGO SHIPPED, NAME OF VESSEL, LOADING PORT AND ESTIMATED DEPARTURE AND ARRIVAL DATE
E. LAYTIME CALCULATION AND STATEMENT OF FACT EXECUTED AT THE PORT OF LOADING, IF APPLICABLE

CONCENTRATED PHOSPHATE EXPORT ASSOCIATION

[306]

AID-230 (4-63), BACK

INVOICE AND CONTRACT ABSTR

INVOICE INFORMATION—THIS SPACE FOR AID USE ONLY

1. PROCUREMENT AUTHORIZATION OR PROJECT IMPLEMENTATION ORDER NO.	2. INV. AMT. AFTER DISCOUNT	3. SOURCE COUNTRY	4. GROSS / LONG TONS
PA 489-901-350-3009	$1,080,477.80	USA	20,851 0267

5. VESSEL—NAME	BULK	BERTH	TANKER	6. FLAG	7. PORT OF EXIT	8. DATE B/L
HELEN H.	X			USA	TAMPA, FLA.	11/8/63

9. COMMODITY OR SERVICE—IN ENGLISH	10. AID CODE	11. INVOICE DATE	12. QUANTITY	13. QUANTITY UNIT	14. UNIT PRICE	15. SHIPPING TERMS
TRIPLE SUPERPHOSPHATE	2353	11/12/63	21,185.839	METRIC	51.00	FOB

16. SUPPLIER'S NAME, ADDRESS, AND SOCIAL SECURITY EMPLOYER NO.	17. CLASS OF SUPPLIER (CHECK ONE)	18. IMPORTER'S NAME AND ADDRESS
13-1965774 CONCENTRATED PHOSPHATE EXPORTX ASSOCIATION, INC.- 420 LEXINGTON AVE. NY, NY	MANUFACTURER, PRODUCER, OR PROCESSOR — PRIMARY SELLER MERCHANT EXPORTER OR OTHER—SECONDARY SELLER	OFFICE OF SUPPLY GOVN'T OF REPUBLIC OF KOREA SEOUL, KOREA

INFORMATION AS TO AGENTS' COMMISSIONS, DOMESTIC AND FOREIGN

19. NAMES OF AGENTS	20. ADDRESSES	21. COMMISSIONS IN INVOICE AMT.—PAID OR TO BE PAID
TAIPYONG COMPANY, LTD.	SEOUL, KOREA	XXXXXXX/2648.23
KUNSUL COMPANY, LTD.	SEOUL, KOREA	XXXXXXX/2648.23

CONTRACT AND PRICE INFORMATION

22. CONTRACT DATE	23. CONTRACT SHIPPING TERMS	24. CONTRACT AMT.	25. CONTRACT QUANTITY	26. CONTRACT UNIT PRICE	27. DOMESTIC UNIT PRICE
8/17/63	FOB	$9,046,450.	177,200 MT	51.00	51.40

28. SPECIFY HERE ITEMS AND AMOUNTS THAT WILL ACCOUNT FOR ANY DIFFERENCES BETWEEN CONTRACT, INVOICE, AND DOMESTIC UNIT PRICES.

CONTRACT NO. FKOS 32022NI AND OSROK'S REFERENCE NUMBER KOS 3400A-N

29. (AID INTERNAL NUMBER, AID-15-4)

INSTRUCTIONS (Continued)

...supplier does not arrange for ocean shipment, Blocks 5 through 9 should remain blank. In Block 9, insert the exact description (in English) for multiple-item invoices insert the descriptive words commonly employed within the industry. If AID Commodity Code is unknown, Block 10 may be left blank. On a Form AID-286 prepared for a multiple-item invoice, "See Invoice" may be inserted in Blocks 13 and 14. Blocks 15 and 23 refer to "FAS and CIF" etc. In Block 16 list supplier's Social Security Employer Number, which AID needs to determine the participation of small business suppliers in the program.

Check of Supplier—Indicate in Block 17 whether (1) manufacturer, producer, or processor of the commodity; or (2) merchant exporter or other secondary seller.

INFORMATION AS TO AGENTS' COMMISSIONS, DOMESTIC AND FOREIGN—Where the amount shown in Block 2 includes a commission paid or to be paid to agent of supplier, the actual amount of such commission in dollars and cents must be entered in Block 21. Write "NONE" in Block 21 if no commissions are involved.

CONTRACT AND PRICE INFORMATION—If there is no formal contract specifically covering this shipment, insert date of confirmation of order in Block 22. Block 27 is producer, manufacturer, or processor's price. In accounting for difference between contract, invoice and domestic unit prices, Block 28, describe and show the effect of: (1) escalator clauses or extras; (2) if the selling price is established on a date other than the contract date, the price-fixing date; (3) ocean freight charges; (4) ocean marine insurance premiums, if any; (5) export differential, if any.

SPECIAL INSTRUCTIONS FOR OCEAN FREIGHT OTHER THAN C&F AND CIF TRANSACTIONS: Omit Block 3. Leave Block 4 blank if quantity is in long tons; otherwise fill it in. In Block 9, show "Ocean Freight" and in Block 10 use "9500" for Code. Blocks 11, 12, 13, and 14, are taken from the freight bill. In Block 15 show "Collect" or "Prepaid." Omit Block 17. Show full information as to commissions paid in Blocks 19, 20, and 21. Omit Blocks 22 through 27 but explain any differences between invoice price and price stated in charter party or contract of affreightment in Block 28.

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SUPPLIER'S CERTIFICATE

The supplier hereby acknowledges notice that the sum indicated on the accompanying invoice as claimed to be due and owing under the terms of the underlying contract is to be paid out of funds made available by the United States under the Mutual Security Act, as in effect on the date hereof, and subject to AID Regulation 1, as amended, and further certifies and agrees with the Administrator of the Agency for International Development (AID) as follows:

(1) The supplier is entitled under said contract to the payment of the sum claimed and he will promptly make appropriate refund to AID upon request of the Administrator in the event of his non-performance, in whole or in part, under said contract, or for any breach by him of the terms of this certificate.

(2) Adjustment refunds or credits arising out of the terms of the contract or the customs of the trade shall be made direct to the buyer, but the supplier will promptly notify the Administrator concerning any such adjustment refunds or credits, so that the Administrator may obtain appropriate refund from the cooperating country. If an adjustment results in an additional charge to the purchaser, the supplier will promptly notify the Administrator of such additional charge.

(3) If the said contract is on a C&F (cost and freight) or a CIF (cost, insurance and freight) basis, the supplier is entitled to payment, under AID Regulation 1, as amended, of any ocean freight charges included in the sum claimed. The supplier is entitled to payment, under AID Regulation 1, as amended, of any ocean marine insurance premium charges included in the sum claimed.

(4) The supplier is the producer, manufacturer, processor, or exporter of, or a regular dealer in, the commodity, or furnishes the service covered by said contract and has not employed any person to obtain said contract under any agreement for a commission, percentage, or contingent fee, except to the extent, if any, of the payment of a commission to a bona fide established commercial or selling agent employed by the supplier as disclosed on the reverse of this form.

(5) The supplier has not given or received and will not give or receive by way of side payment, "kickbacks," or otherwise, any benefit in connection with said contract except as is disclosed on the reverse of this form, or as is the result of the adjustments referred to in Paragraph 2.

(6) If the supplier is the producer, manufacturer or processor of a commodity, said contract is not a cost plus-a-percentage-of-cost contract.

(7) The supplier further certifies, on the basis of information obtained from such sources as are available to him, that to the best of his information and belief the purchase price is no higher than the market price (which shall mean the export market price, where such a price is customary in the trade) prevailing in the United States at the time of purchase, adjusted for differences in the cost of transportation to destination, quality, and terms of payment.

(8) The supplier further certifies that (a) on the basis of information obtained from such sources as are available to him, and to the best of his information and belief, the purchase price is no higher than the price calculated in accordance with the applicable price provisions of AID Regulation 1, as amended, and he has complied with the rules provided therein; and (b) he has allowed all discounts, including discounts for quantity purchased and prompt payment, customarily allowed his other customers similarly situated.

(9) If the supplier furnishes only a service, he shall not be deemed to certify to paragraphs 7 and 8 but instead certifies that the rate indicated on the reverse of this form for the service rendered does not exceed the prevailing rate, if any, for similar services, or the rate paid to the supplier for similar services by other customers similarly situated.

(10) The supplier has filled in the applicable portions of the invoice-and-contract abstract on the reverse hereof, certifies to the correctness of the information shown therein, and will furnish promptly to the Administrator at his request such additional information in such form as the Administrator may require concerning prices and any other details of the purchase.

11/12/63
Date

[signature]
Authorized Official (See Instructions)

SECRETARY
Title

NEW YORK, NEW YORK USA
(Place executed (City, State, County))

NOTES: (a) *Any amendments, deletions of applicable provisions, or substitutions will invalidate this certificate.* (b) *False statements herein are punishable by United States law.* (c) *The word "Duplicate" must be written after signature on all signed copies other than the original.*

AID-280 (4-63) AGENCY FOR INTERNATIONAL DEVELOPMENT

GPO 862-647

(Tear off this stub after filling in form)

INSTRUCTIONS

SUPPLIER'S CERTIFICATE—A signed original, and two copies of form AID-280 are to accompany each invoice for which payment is requested. Normally, ONLY the original should be signed. If two or more signed copies other than the original need to be signed, they should be clearly marked "duplicate" after the signature. Form AID-280 should be signed by a responsible official of supplier indicating capacity in which signed. Contracts are not to be submitted to AID unless specifically requested. In the case of ocean freight, however, charter parties or contracts of affreightment, if any, are to accompany reimbursement documents, except for CIF and C&F transactions. See special instructions below relating to ocean freight. Other requirements of AID Regulation 1, as amended, including marketing requirements, are to be complied with. This form may be obtained in limited quantities from banks holding AID Letters of Commitment, Regional Offices of the Department of Commerce, or Agency for International Development, Distribution Section, PS/OSD, Washington, D.C. 20523. Forms may be reproduced, provided the reproduction is identical in content, size and format.

INVOICE INFORMATION (see reverse side)—AID Procurement Authorization or Project Implementation Order number must be inserted in Block 1 by supplier. The amount shown in Block 2 is the net amount for which the supplier seeks payment; it must not include any commission to an importer's purchasing agent and must be net of all discounts. Commission paid or to be paid in connection with the transaction covered by this certificate to agents of supplier which are included in amount shown in Block 2 must be detailed in Blocks 19, 20, and 21. In Block 3, show source country as defined in § 201.1(m) of AID Regulation 1. In Block 4, show the bill of lading weight rounded to nearest whole ton, if expressed in other than long tons (convert to long tons (2,240 pounds or 40 cubic feet to the ton.) Where

[308]

DUPLICATE

File 1217-37
Order L-3071

No. 3160/62

Certificate of Robert W. Hunt Company, Engineers

General Offices 810 South Clinton Street Chicago 7, Ill.
Cable Address: Hunt, Chicago

November 15, 63.

Bureau of Procurement - Office of Supply
Government of the Republic of Korea - Pusan, Korea

For account of Concentrated Phosphate Export Association, Inc.
Furnished by 420 Lexington Avenue, New York, N. Y. 10017.

We Certify the following material has been inspected, and in accordance with our opinion based upon the report of our Inspectors and our experience and judgment has been accepted under the instructions provided.

SUPPLIER'S LOT, P-825 [illegible]-W-1
CHECK NO. [illegible]
[illegible] CONTRACT NO. [illegible]

Certificate of Weight, Inspection and Analysis of:

21,185,839 Metric Tons net of Triple Superphosphate Granular, 46% P_2O_5 minimum, in bulk form.

The material was fully cured, free flowing, solid form, chemical fertilizer, 93% retained on #20 mesh screen and not more than 5% on #6 mesh screen at time of shipment.

We selected samples, at random, during the loading of the above mentioned quantity of Triple Superphosphate for shipment aboard S/S "Helen H" at Tampa, Florida to a Korean Port as per Bill of Lading dated November 13, 1963.

The composite samples have been analyzed by AOAC method with the following results:

Granular Triple Superphosphate - P_2O_5 available -	46.1%
	46.9%
	46.1%
	46.0%
	46.1%
Moisture -	1.5%
	0.5%
	1.1%
	1.3%
	1.0%

Certified

Form D 11354

[309]

DUPLICATE

File #1017-67 | New York 7, N. Y. | 3168/.7
Order B-3071 | November 15, 1963 | Page - 2 -

Sieve Analysis:

96.1% }
99.6% }
97.9% } retained on #20 mesh standard sieve.
98.5% }
97.0 }

0.8% }
1.4% }
0.6% } retained on #6 mesh standard sieve.
0.6% }
0.6% }

Ample samples were sent via Air Mail on November 13, 1963 - U.S.O.M. Korea, APO 301, San Francisco, California - Attention: TC-40 Fertilizer Adviser.

Material loaded aboard S/S "Helen H" was found to be properly stowed.

As a result of inspection and above analysis, we find that the commodity covered by this Certificate was in accordance with Contract No. F-ICA 3302-1-1, at time of inspection.

Our obligation in making this inspection and forwarding this Certificate extends only to our Client and represents our opinion on the date of inspection only.

Respectfully submitted,

Robert W. Hanell Company

J. J. Costello, Jr.

FORM 0100-1 JJC:HLB

280

[310] 280

INTERORE SHIPPING CORPORATION

P. O. BOX 2735
404 JACKSON STREET
TAMPA 2, FLORIDA

PHONE: TAMPA 223-1726
CABLES: INTERORE TAMPAFLORIDA

B/L NO. 1

"CLEAN ON BOARD"
TAMPA, FLORIDA
NOV. 8th, 1963

Shipped in good order and condition by OFFICE OF SUPPLY, REPUBLIC OF KOREA

in and upon the Steamship called the (AMERICAN FLAG) S. S. "HELEN H" - VOY. 1-OUTWARD

whereof is *Master* for the present voyage MICHEAL LIVANOS or whoever else may go as master of the said vessel, now lying in the port of TAMPA, FLORIDA

and bound for ONE SAFE PORT, REPUBLIC OF KOREA

46,706,300 POUNDS - 21,185.839 METRIC TONS OF 2204 LBS EACH
TWENTY THOUSAND EIGHT HUNDRED FIFTYONE.0267 (20,851.0267) Tons of 2240 lbs. each of

GRANULAR TRIPLE SUPERPHOSPHATE 46% MIN. in bulk, more or less, all on board to be delivered, being marked and numbered as per margin; and to be delivered as per Charter-party where the ship's responsibility shall cease, in the like good order and condition, at the aforesaid port of ONE SAFE PORT, REPUBLIC OF KOREA

Copy-Not-Negotiable

unto OFFICE OF SUPPLY, REPUBLIC OF KOREA

NOTIFY: OFFICE OF SUPPLY, REPUBLIC OF KOREA

"FREIGHT PREPAID" Assigns, he or they paying freight at the rate of

- - AS PER CHARTER PARTY DATED AUGUST 6, 1963 NEW YORK - - per ton of 2240 lbs.

This Bill of lading is subject to all the conditions and exceptions and liberties contained in the Charter-Party dated AUGUST 6, 1963, NEW YORK

It is mutually agreed that this Bill of lading shall have effect subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of February, 1893; and entitled: "An Act Relating to Navigation of Vessels, etc.," and to the carriage of goods by Sea Act of the United States, approved April 16, 1936.

In Witness Whereof, the MASTER or Agents of the said ship hath affirmed to THREE ORIGINALS (3) Bills of lading, all of this tenor and date, one which being accomplished, the others to stand void.

Weight and Quality unknown.

Dated at TAMPA, Fla., U.S.A., the 6TH day of NOVEMBER, 1963

INTERORE SHIPPING CORPORATION, AS AGENTS

BY: [signature]
FOR THE Master.

Stowed in Hold No. ONE, TWO, THREE AND FOUR and WINCO TANKERS, INC., Owners

"THESE COMMODITIES LICENSED BY THE U. S. FOR ULTIMATE DESTINATION KOREA. DIVERSION CONTRARY TO UNITED STATES LAWS PROHIBITED"

"THIS IS A PRIVATELY OWNED UNITED STATES FLAG VESSEL"

REFERENCE NO.
OSROK AID PA 469-KOR-356-3009
SUPPLIER COMMODITY NO. F-KOS-32022-M-1,
OSROK REFERENCE NO. KOS-34004-N
FREIGHT CONTRACT NO. K-KOS-32023-OT-M

[311-312]

DUPLICATE

File 1017-67
Order B-2071

No. 2163/62

Certificate of Robert W. Hunt Company, Engineers

General Offices 8743 South Chicago Street Chicago 17

November 15, 1963.

For account of Bureau of Procurement - Office of Supply
Government of the Republic of Korea - Seoul, Korea

Furnished by Concentrated Phosphate Export Association, Inc.
420 Lexington Avenue, New York, N. Y. 10017.

We Certify the following material has been inspected, and in accordance with our opinion based upon the report of our Inspectors and our experience and judgment has been accepted under the instructions provided.

Re: CHECK REF. NO. KOR 21004-E
AID NO. PA 489-901-356-3009
SUPPLIER COMMODITY NO. P-KOR 32002-E-1
PRIMARY CONTRACT NO. KOR 32002-CE-E

Check weighing and measuring of:

21,195.839 Metric Tons (46,705,000 lbs.) of Granular Triple Superphosphate, 46% minimum P_2O_5, loaded aboard the S/S "Helen E" as per Bill of Lading, dated November 8, 1963.

Our obligation in making this inspection and forwarding this Certificate extends only to our Client and represents our opinion on the date of inspection only.

Respectfully submitted,

Robert W. Hunt Company

J. J. Cordello

FORM 6151-1 3.5(1)(2)

[313] EXHIBIT 29

INTERNATIONAL COOPERATION ADMINISTRATION

Manual Order Transmittal Letter

No.: General-505
Date: Dec. 19, 1957

MATERIAL TRANSMITTED:

M.O. 251.9—*Revised Memorandum of Agreement between the International Cooperation Administration and General Services Administration*

The attached Manual Order incorporates the revised ICA participating agency General Agreement with the General Services Administration, which was recently renegotiated.

The Agreement states the type of services to be performed by GSA for ICA—mainly procurement—and the terms and conditions under which GSA will render these services.

The Agreement was signed by the Administrator of GSA on June 28, 1957, and the Director of ICA on August 2, 1957. It became effective beginning July 1, 1957.

[314] *I. Purpose*

The purpose of this Agreement is to indicate the nature of procurement and related services to be performed by the General Services Administration (hereinafter referred to as GSA) on behalf of the International Cooperation Administration (hereinafter referred to as ICA) and the terms and conditions upon which such services and facilities will be made available.

Orders placed directly with GSA Stores Depots pursuant to Federal Supply Service Order No. 103, dated March 11, 1957, are not within the purview of this agreement.

II. Redelegation of Authority

Pursuant to the authority delegated to him by virtue of the Mutual Security Act of 1954, as amended, Executive Order 10575, as amended, Executive Order 10610, as amended, State Department Delegation of Authority No. 85,

as amended, and any other applicable law, the Director of ICA authorizes GSA:

A. To procure for the benefit of cooperating countries or of ICA, as the case may be, commodities and services described in authorizing documents (PIO, PA/PR, FCA, etc., hereinafter referred to as "purchase authorizations") issued by ICA, and accepted by GSA, in accordance with the terms or such authorizing documents.

B. To transfer, in accordance with the terms and provisions of such purchase authorizations, such commodities to, and to render such services for, or on behalf of, the government of the cooperating country or ICA, as the case may be.

C. To incur administrative and operating expenses incident to the foregoing functions.

III Budgetary Authorization

ICA agrees to provide GSA with funds necessary to pay:

A. Cost of commodities and services covered by purchase authorizations, including transportation and costs of arranging for transportation.

B. Administrative and operating expenses of GSA based upon surcharge rates discussed more fully in Section VI hereof.

C. Cost of liquidating procurement programs undertaken under this agreement.

D. Operating deficits when occasioned by inadequate surcharge income due to changes in procurement workload.

[315] *IV. Financing*

Purchase authorizations received by GSA will be immediately processed for procurement without checking cash balances, with the understanding that ICA assumes full responsibility for availability of funds to cover all such authorizations.

Cash required to meet disbursement needs under this agreement shall, as needed, be transferred to GSA by ICA on Standard Forms 1151. GSA agrees that any funds transferred in excess of amounts necessary to cover commitments under the agreement will, upon request, be returned to ICA.

V. Apportionments and B-T 1 Reports

ICA shall be responsible for apportionments, recording of obligations, and preparation of Standard Form 133.

VI. Surcharge

In order to more equitably provide for administrative and operating expenses applicable to procurements of varying volumes, the following schedule of surcharge rates payable in U.S. dollars shall be placed in effect with respect to all procurement authorizations received by GSA after July 1, 1957, subject to a minimum charge of $25 per purchase authorization.

Amount of Authorization	Surcharge Rate
Up to $100,000	6%
$100,011 to $1,000,000	2%
Over $1,000,000	1%

The foregoing schedule of rates is based on the relative weight of procurement volume current at the time of this agreement. Significant shifts in the volumes as between the several ranges may require later adjustments in rates to ensure sufficient income to cover administrative and operating expenses of GSA. Accordingly, not less often than once each year, or at such time as changes are considered necessary, ICA and GSA will undertake to review costs and income and to effect appropriate changes therein by amendments to this agreement through an exchange of letters.

At the time of close-out of each purchase authorization, the final surcharge will be computed on the basis of the rate applicable to the net commodity and non-administrative costs, such as freight, accessorial, etc., and the original entry based on the purchase authorization estimate adjusted accordingly.

Funds required to liquidate work in process at the termination of active procurement programs will be provided by lump sum advance or otherwise, as provided for in Section III.C. hereof.

[816] *VIII. Specific Purchase Limitations and Accountability.*

A. All contracts, purchase orders, or other obligations, including the applicable surcharge, will be prevalidated by GSA against the amount of the purchase authorization. Except as provided below, no procurement action shall be initiated by GSA where the aggregate of such costs exceeds the amount of the purchase authorization until GSA receives from ICA an amendment to the purchase authorization increasing the amount of the authorization. Where, however, GSA requests increases in the amount of the authorization which are within the following specified limits, GSA may, after making the request to ICA, proceed with procurement action without awaiting receipt of an mendment:

Amount of Authorization	Requested Increase
Under $1,000	Not over $200
Over $1,000	Not over $500

Appropriate action will be taken by ICA to establish reasonable reserves in its accounts to cover allowable increases.

B. Disbursements to liquidate obligations incurred by GSA against a purchase authorization (whether or not increased under "A" above) may exceed the amount of said authorization within the following specified limits:

Amount of Authorization	Amount of Allowable Excess
Under $5,000	$25.00
$5,000 to $100,000	½ of 1%
Over $100,000	$500.00

C. At the time of close-out, total costs incident to each specific purchase authorization (including but not limited to the cost of commodities and services, transportation, and accessorial costs, together with the surcharge for administrative and operating expenses

based on application of the rate provided for in Section VI to the net procurement volume) shall be reported to ICA/W.

VIII. Determination of Commodities and Services to be Supplied

Commodities and services to be supplied hereunder shall be determined by ICA and shall be covered by official ICA purchase authorizations issued to GSA. Notwithstanding this agreement, GSA shall have the right to return to ICA/W any purchase authorization if it determines that the quantity, quality or the type of commodity or service ordered cannot be effectively provided.

[317] *IX. Procurement and Delivery Responsibilities of GSA*

1. *Procurement*

A. GSA, as agent for ICA and in accordance with specific directives of ICA, will arrange for acquiring and shipping commodities, and for procuring marine insurance thereon, for ICA or its designee. Shipping shall include storage, necessary transportation, processing, and other services in connection with the delivery of commodities to ICA or its designee aboard vessel, FAS, and other points. GSA will also perform functions necessary to carry out the requirements stipulated by ICA in the purchase authorization.

B. Delivery should be made within the delivery schedule specified in the purchase authorization and GSA will make every effort to procure and deliver within such schedules. However, GSA is authorized to extend delivery periods for a period not to exceed 60 days, without prior reference to ICA, except where the related purchase authorization stipulates a mandatory delivery date. GSA will inform ICA of any extensions of delivery period so that a confirming amendment to the purchase authorization may be issued. In the case of purchase authorizations issued by ICA/W this information will be transmitted by memorandum directed to the Authoriza-

tion Control Branch, Financial and Procurement Methods Division, ICA/W and in the case of purchase authorizations issued directly to GSA by a USOM, GSA will notify the USOM directly by airgram. GSA shall not be held liable if delivery is delayed for reasons beyond its control.

C. Commodities shall be procured only from the country or area of origin indicated in the purchase authorizations.

D. GSA shall comply with special instructions issued by ICA with respect to commodities purchased outside the continental United States.

2. *Delivery*

A. *Point of Delivery.* GSA shall arrange for delivery of commodities to ICA or its designee at such points as are directed by ICA.

i. When GSA arranges for ocean transportation, the commodity shall be deemed delivered to ICA or its designee when receipted for by issuance of an on board bill of lading by the ocean carrier.

ii. When GSA arranges for transportation of a non-oceanic character to the cooperating country, delivery of the commodity to ICA or its designee shall be deemed to occur when it is delivered to the inland carrier and an appropriate receipt therefor issued by the carrier.

[318] iii. When GSA is not directed to make arrangements for transportation to the cooperating country, delivery of the commodity to ICA or its designee shall be deemed to occur when the commodity is placed at a point or points designated by ICA and appropriate receipts obtained from the persons taking custody of the commodity for the benefit of the consignee.

GSA shall be responsible for obtaining and distributing signed on board bills of lading or such other receipted documents and supporting papers which shall serve as evidence of delivery to ICA or its designee.

B. *Quantity and Quality.* At the time of delivery to ICA, or its designee, the commodities shall conform to the quantities, types, and grades ordered unless substitute types and grades have been agreed to in writing by ICA. Compliance as to quantities, types, packaging, varieties, grades and pack of all commodities delivered shall be determined by inspectors designated by GSA.

C. *Markings.* GSA shall arrange to have containers of all commodities delivered under this agreement marked in accordance with instructions from ICA, and shall arrange for such other markings as ICA may require.

X. *Coverage of Purchase Authorizations*

A. ICA purchase authorizations shall include all information required to ensure prompt procurement and delivery of the commodities. Whenever commodities are subject to restricted allocations the quantities ordered shall be consistent with allocations which have been made.

B. In certain cases it may be desirable for ICA to initiate purchase of quantities of commodities before it can stipulate the country or countries of destination. In such cases, authorizations shall be issued directing GSA to procure for the purpose of building up an inventory for the account of ICA. Whenever ICA determines the desired disposition of such commodities it shall issue purchase authorizations indicating such disposition until the entire quantity of the inventory is disposed of. In order to avoid duplicate purchases by GSA for the account of ICA, each such purchase authorization shall be clearly referenced as a disposition notice applicable to the direction to GSA to build up an inventory.

C. Generally, the purchase authorization will furnish delivery and shipping instructions. In cases where this is not done ICA shall, as promptly as possible following notification of availability by GSA, issue delivery instructions. Where ICA designates an agency other than GSA to arrange for ocean shipment it shall notify GSA of the designee and shall instruct

such designee to furnish instructions regarding shipment to GSA as promptly as possible after notification of availability is given such designee.

[319] *XI. Cancellation of Purchase Authorizations*

ICA reserves the right to cancel in whole or in part any purchase authorization issued, or any official directive instructing GSA to procure in advance of receipt of the purchase authorization. However, ICA shall be liable for all losses sustained as a result of such cancellation. When GSA is appraised of such cancellation, with respect to all commodities to which title has not yet passed, GSA will endeavor to obtain no-cost cancellation agreements from the contractors involved, and if such agreement cannot be obtained, GSA will further endeavor to obtain offers from the contractors concerned as to the amounts which would be charged for cancellation of the particular contracts concerned. If cancellations at a figure acceptable to both the contractor and ICA cannot be obtained by GSA, ICA will advise GSA as to disposition of the material.

XII. Title and Risk of Loss

Title and risk of loss shall pass from the supplier to ICA, or its designee, concurrently with delivery of commodities in accordance with the terms of the contract between GSA and the supplier. Notwithstanding this, in the event of loss, GSA, as an agent of ICA will take all necessary steps to protect the interests of the United States Government.

XIII. Claims

A. GSA shall be responsible for handling claims arising in connection with its procurement function. In addition, GSA shall be responsible for handling all transportation claims arising between the time of delivery of the material by the supplier and up to the point when it has been stowed aboard the vessel, or placed at such point as ICA shall direct transfer to its designee. GSA shall have no initial responsibility for claims arising after commodities are stowed aboard the vessel, even though it has arranged for the ocean shipment. However, when requested by ICA, GSA shall furnish any assistance needed for the collection of

claims resulting from such ocean movement. GSA shall not be responsible for handling General Average claims arising in connection with self-insured shipments.

B. When any person other than GSA arranges for ocean shipment, GSA's responsibility shall be limited to claims arising up to the time of delivery to on board ship or to that other person.

XIV. Reports and Records

A. *Disbursements*

GSA will transmit to ICA every ten days a report of disbursements on a check-issued basis under each appropriation against outstanding authorizations supported by such forms as are required by ICA for each disbursement, and showing the current cash balance of each of the advances from appropriations.

[320-321] B. *Other*

GSA shall furnish ICA with such other reports, providing accounting or other information, as may be agreed to mutually.

C. GSA shall maintain such records and documents as will substantiate the reports.

XV. Amendment or Termination

This agreement may be amended at any time by written agreement of both parties. In addition, either party by written notice to the opposite party may, subject to the provisions of Section III, terminate the agreement effective on such date and subject to such conditions with respect to work in the pipeline as may be mutually agreed to.

XVI. Effective Date

This revised Agreement shall be effective July 1, 1957.

General Services Administration. /s/ Franklin A. Floete, Administrator, June 28, 1957.

International Cooperation Administration. /s/ John B. Hollister, Director, August 2, 1957.

WORK SHEET PAGE 1 OF 3 PAGES

ICA-LI-21 (Rev.) AID/W PROCUREMENT AUTHORIZATION AND REQUEST FOR APPROVAL OF PROCUREMENT PROGRAM COST APPLICATION
INTERNATIONAL COOPERATION ADMINISTRATION, UNITED STATES OF AMERICA, WASHINGTON 25, D. C.

1. COOPERATING COUNTRY: Republic of Korea	2. APPLICATION NUMBER: 489-3-8	#3002
3. ORIGINAL (X) AMENDMENT NO.	4. RELATED PA NUMBER	
5. ALLOTMENT SYMBOL: 356-64-489-56-59-31	7. U. S. BANKING INSTITUTION: J.Henry Schroder Banking Corporation, New York	8. APPROVED APPLICANT: Bank of Korea
6. METHOD OF FINANCING: Loan to a U.S. Bank 72-11B108		

PROPOSED PROCUREMENT AGENCY		10. PROPOSED AREA OF SOURCE	11. PROPOSED BASIS OF DELIVERY
COOPERATING COUNTRY: OSROK	U. S. AGENCY: -	U. S. (000)	F O B

12. PERIOD CONTRACTING PERIOD	13. REVISED DELIVERY PERIOD
FROM Dec. 1, 1962 ENDING March 1, 1963	FROM Feb. 1, 1963 ENDING July 1, 1963

14. ESTIMATE OF COSTS — AUTHORIZED CURRENCY: U.S. DOLLAR — AUTHORIZATION VALUE

	PREVIOUS	INCREASE	DECREASE	TOTAL
(A) COMMODITY				
(B) OCEAN FREIGHT				
(C) LANDED COST (A + B)		$3,000,000		$3,000,000
(D) DOLLAR EQUIVALENT (@ 1.00)				

15. ITEM NO.	16. COMMODITY CODE	17. QUANTITY / DESCRIPTION / SPECIFICATIONS	18. ESTIMATED COST
1	235	Phosphates and Phosphate Fertilizers (Bulk to Buyer Approx. 30,000 M/T P_2O_5): funds controlling quantity. A. Triple Superphosphate (Commercial Granular) 46% P_2O_5 (APA)	$3,000,000.00

DISPATCHED DEC 10 1962 AID/W USOM/KOREA

19. SPECIAL INSTRUCTIONS AND CONDITIONS

20. END-USE AND JUSTIFICATION
Increased Barley Acreage Totalling 1,043 million Hectares for 1963 to meet expended food needs.

21. FOR THE COOPERATING COUNTRY — Authorization of the procurement described herein is hereby requested. Procurement, pursuant to authorization issued on the basis of this application, will be carried out in accordance with terms and conditions specified in such authorization.
(Signature) Director, Bureau of Economic Cooperation, MPI (Office) 12/7/62 (Date)

22. USOM CLEARANCES	DATE	23. ICA/W CLEARANCES	DATE
		L B Myers Assistant Director for Program & Economic Policy	12/7/62
		P Davies, FE/Korea	12/17/62

[323] ☐ WORK SHEET ☐ ENGLISH PAGE 2 OF 3 PAGES

AID-10-3 (11-58)	TITLE OR DESCRIPTION OF FORM	3. COORDINATING CHARGE	4. FORM NUMBER
	CONTINUATION SHEET INTERNATIONAL COOPERATION ADMINISTRATION UNITED STATES OF AMERICA	5. TITLE OR DESCRIPTION OF ACTIVITY	
CONT.			

USE THIS FORM TO COMPLETE THE INFORMATION REQUIRED IN ANY BLOCK OF A PID OR PAA FORM. INSERT TITLE OF FORM ABOVE. SUBSCRIPT BLOCK NUMBER BELOW.

B. Basis of Delivery

FOB Port of Shipment; Ocean freight and other shipping costs beyond FOB port of shipment will be funded by host country.

All charges ex-Spout including filling and trimming charges beyond those of seagoing trim will be to the expense of the buyer.

C. Bidding, Evaluation and Awards

Bids will be evaluated and awards made on the basis of the lowest FOB cost per unit of plant-food nutrient within the carrier or material specified.

D. Fertilizer Condition

Fertilizer for the purpose of this PA shall be fully cured, solid form; chemical fertilizer, commercially Granular, conforming to U.S. Federal Specifications. The fertilizer shall be in a dry and free flowing condition at the place and time of delivery to the buyer. Place of delivery for FOB purchases to be on board vessel at port of loading. The supplier will not be held responsible for condition or chemical specifications beyond the point of inspection at point of delivery.

E. Bidders may offer and buyer may accept higher plant food nutrient material than 46% P_2O_5 APA. However, such offers shall be evaluated and awarded on the basis of not more than 45% P_2O_5 APA specified.

F. Inspection

(a) Shipments from source country of FOB bulk fertilizer materials shall be inspected at time of loading into vessel by an internationally recognized independent inspection service and analyzed to determine that plant nutrient content, by Association of Official Agricultural Chemists (AOAC) Methods of Analysis, conforms to or is better than the contracted chemical and moisture contents. Additionally, inspection shall be made on the following item: Physical condition of material. The inspection service shall certify as to the weights delivered to the ocean carrier of bulk fertilizer materials.

(b) Inspection Certificates: Certified copies of the inspection and analysis certificates for each shipment, must include total weight, and shall be submitted by the independent inspection service via air mail to:

[324-325]

COST.	CONTRACTOR SERVICE INTERNATIONAL COOPERATION ADMINISTRATION UNITED STATES OF AMERICA		

1. USAID/Korea
2. The importer, Seoul, Korea
3. The supplier (for attachment to documents submitted to the bank for payment)

Cost of inspection must be included in the offering price and paid by the supplier.

The inspection service selected shall be acceptable to the buyer and seller.

C. Barter Provision: Any offer to supply commodities hereunder, involving a sale price of $100,000 or more, made on a bid basis pursuant to an invitation for formal bids and which expresses a willingness to accept surplus agricultural commodities from the Commodity Credit Corporation as full payment in lieu of dollars shall have preference over any other bid/offer where price and other terms of the bid/offer are equal. Bidders having such agreement must state that fact in their bids and applications for letters of credit must provide that payment for such bidders account will be made directly to the Commodity Credit Corporatio

H. Additional Documentation: Apart from the documentation required for reimbursement by Sec. 201.16 of IA Reg. 1, and other special provision will require suppliers to airmail as soon as possible a copy (or photostat) of each Bill-of-lading and of each charter Party (where applicabl as follows:

1 copy to: AID, MR/Office of Transportation, Washington, D.C.
5 copies to: USAID (AD/P-SM), Seoul, Korea, of which one copy shall be marked to the attention of the Agriculture Division, USAID, ROD)

I. Compliance with AID Reg. 1, Sec. 201.13 is required

J. To be eligible for reimbursement by AID, suppliers documentation must include signed Independent Inspection Service Certificates, as specifie in provision "F" above. Certificate shall state if shipment has or has not met specifications.

K. Delivery Date Compliance: Failure to meet the contracted delivery date will subject the supplier to a penalty as established by OSROK Invitation to bid.

L. Ocean Transportation Provision: Attached.

M. Geographic Source-Origin Provisions: Attached.

N. Letter of Commitment #467-184?
"U.S. Banking Institution Responsibilities"

O. For mailing purposes, the address of USAID/Korea is USAID/Korea, APO 301, San Francisco, California.

[326-327]

EXHIBIT 31

USOM FISC. OFFICER COPY

* EX 30A

AID/C

AID-11-72
(5-63)

PC/72

PROCUREMENT AUTHORIZATION
AND
U.S. GOVERNMENT AGENCY PURCHASE DESCRIPTION
DEPARTMENT OF STATE
AGENCY FOR INTERNATIONAL DEVELOPMENT
WASHINGTON 25, D. C., USA

1. U.S. GOVERNMENT AGENCY — REFERENCE NO.

GSA/FSS/KXD - 12

AUTHORITY TO PURCHASE - You are hereby authorized to procure the commodities and/or services described herein for the country specified in block 3, from the source specified in block 4, for delivery in the period specified in block 7.

2. [illegible] NO. 489-295-901-3002
TYPE OF AUTHORIZATION: original AMENDMENT NO.
AUTHORIZATION DATE: [illegible]
APPROPRIATION DATA: 72-49-189-06-72-31
3. COUNTRY AND ALLOTMENT NO.: FSS T2-1191006
4. SOURCE: Code 941 - United World-Wide
5. DELIVERY PERIOD: Not later than June 30, 1963

6. ITEMS (a)	PREVIOUS TOTAL (b)	INCREASE (c)	DECREASE (d)	NEW TOTAL (e)
TOTAL VALUE		3,000,000		3,000,000
COMMODITY AND/OR SERVICE COST				
VALUE TOLERANCE ____%				
ADMINISTRATIVE COST ____%				
[illegible]				
UNIT OF LOADING				
[illegible]				

7. [illegible]

A. Funds made available by this authorization up to the amount shown in Block 6 (E), may be used for procurement of the commodities and/or services listed herein or for such other commodities and/or services as may be agreed upon in subsequent amendments to this authorization.

B. Commodity: Fabricated and Synthetic Fertilizers
Title to buyer
Funds controlling quantity purchased.

Triple superphosphate, granular, minimum 46% P_2O_5 (A.P.A.)

DISPATCHED FEB 15 1963 AID/W/C

C. Basis of Delivery: CAF
Surface ship to one safe Korean port which will be nominated by cable five days prior to the arrival of the shipment in Korean [illegible] Feb. March 8 (POAU 1012)

8. FOR AID USE ONLY	FOR THE ADMINISTRATOR: [illegible]
DATE OF ORIGINAL TRANSMISSION: Feb. 12, 1963	DATE OF THIS TRANSMISSION: Feb. 12, 1963

9. AUTHORIZATION - This authorization is issued under, and is subject to the provisions of the Regulations, as amended or any law up to the date of this issuance.

10. ACCEPTANCE - The cooperating country hereby acknowledges receipt of this authorization and confirms that the commodities described herein, to be furnished through the U.S. Government agency indicated above, are those requested and to be furnished in accordance with and subject to the terms and conditions set forth herein.

FEB 12 1963

[illegible]

[illegible]

D. Shipping:

1. No cargo will exceed 10,000 metric tons in order to permit accessibility to the designated Korean port.

2. Two (2) full cargoes (10,000 M/T each) shall be lifted by U.S. flag tramp vessels.

3. The remaining tonnage to be shipped in accordance with Para K., Ocean Transportation Provision.

E. Documentation: Standard GSA documentation. In addition, Suppliers Certificate (A.I.D. Form 280) and Source-Origin Certificate specified below are required. Suppliers who are not manufacturers of the materials supplied will, in addition, support their request for payment with a copy of the manufacturer's complete and detailed invoice to them, demonstrating their acquisition of the material supplied.

All documents and Bills of Lading to be airmailed to:

A.K. White, AD/P-SM
USOM/Korea
APO 301
San Francisco, California

F. Bagging:

Bulk shipment. Korean domestic paper or jute bags will be used at port of entry.

G. Bidding and Evaluation of Awards:

Bidders may offer and buyers accept higher plant food nutrient material than 46% P_2O_5 (APA). However, no offers shall be awarded except on the basis only of 46% P_2O_5 (APA).

Only in case of tie bids will preference be given to material containing more than 46% P_2O_5 (APA).

H. Inspection: Shipments of fertilizer shall be inspected prior to shipping by GSA or representatives for compliance with chemical and physical composition of material.

Fertilizer for the purpose of this PA/PR shall be fully cured, solid form, chemical fertilizer in a free flowing condition conforming to U.S. Federal Specifications when loaded aboard vessel.

I. Barter Provision: Any offer to supply commodities hereunder, involving a sale price of $100,000 or more, made on a bid basis pursuant to an invitation for formal bids, and which expresses a willingness to accept surplus agricultural commodities from the Commodity Credit Corporation as full payment in lieu of dollars shall have preference over any other bid/offer where price and other terms of the bid/offer are equal. Bidders having such an agreement must state that fact in their bids, and applications for Letters of Credit must provide that payment of each bidder's account will be made directly to the Commodity Credit Corporation.

J. HONG KONG PROCUREMENT PROVISIONS: Attached

K. OCEAN TRANSPORTATION PROVISION:

Section 901(b) of the Merchant Marine Act of 1936 (as amended), U.S. Flag shipping requirement, is applicable to procurement hereunder.

The cost of ocean transportation (Code 950) and the cost of other services (Code 940) furnished in connection with the shipment of commodities authorized herein, although not paid by the suppliers of the commodities, are also eligible for reimbursement hereunder.

L. GEOGRAPHIC SOURCE-ORIGIN:

1. Suppliers are required to certify that the commodities shipped hereunder are, with respect to both source and origin, from countries or areas indicated in the AID Geographic Code indicated in this authorization. The definition of the term 'source' is found in Section 201.1(M) of ICA Regulation I. The term 'origin' means the country of area in which a commodity is mined, grown or produced. A commodity is produced when, th through manufacturing, processing, or substantial different in basic characteristics or in purpose or utility from its components.

2. The following certification on 'source' and 'origin' must be attached to or endorsed on each invoice presented for reimbursement and must be signed by the supplier or his authorized representative:

I (We) hereby certify that the 'origin' (as defined by AID) of the commodities listed on the attached invoice or invoiced herein is as shown below, that such 'origin', as well as the 'source' shown in Block 3 of AID Form 280, is included in the AID Geographic Code authorized in the procurement document under which this shipment is made, and that this information is true and correct in all respects.

Origin of Commodities_____

Signed_____ Date_____

Title_____

[330] J. [illegible]

This authorization may not be used to purchase any commodity without a Treasury license if there is an interest in the commodity or in the transaction of a "designated national" including a "specially designated national" as defined in Sections 500.305 and 500.306 of the Foreign Assets Control Regulations. For the definition of "national" see Section 500.302 of the Regulations.

In addition to the restrictions set forth in this authorization, the limitations contained in Section 500.204 of the Foreign Assets Control Regulations are applicable hereto. The procurement of merchandise otherwise prohibited by Section 500.204 (a) (2), (3), and (4) may be permitted hereunder provided appropriate certificates of origin, as defined in Section 500.536 of the Regulations, are obtained by the Hong Kong supplier from the Hong Kong Department of Commerce and Industry. The certificates constitute additional documents that the supplier must present in order to secure payment.

EXHIBIT 33

ITEM: FERTILIZER, Triple Superphosphate, Commercial Granular, minimum of 46 percent P_2O_5 (APA), in bulk.

RECIPIENT CONTENT & CODE: Korea - 149
PA/PC NO.: 489-235-901-3002
GENERAL

F.A.S. or F.O.B. Vessel U.S. Port
F.O.B. Vessel Foreign Port

BID TABULATION

COMMODITY CLASS NO.: 235
SERVICES ADMINISTRATION AREA OF SOURCE: 901

FAIR-3-63(F-4-3-7-63)

Page 1 of 1 Pages

		QUANTITY:-	Option Quantity 40,000	Metric Ton #									
S	Central Resources Corp. New York 5, N. Y.		50.00	F.O.B. Vessel Sfax, Tunisia; Barreiro, Portugal. Price includes dunnage & trimming.		46.1% Minimum	30,000		30	2 days	See Note I on bid
		ALT.-	PRICES:	C&F One Safe U. Korean port chartered USA flag vessels.					3-22-63	Shipment: Latest May 31 1963.	
			70.20	1st cargo							
			70.50	2nd cargo							
			70.80	3rd cargo							
O	Consentrated Phosphate Export Association, Inc. New York 17, N. Y.		55.18	F.O.B. Vessel, Tampa Range, Florida, spout trimmed only not filled or leveled.		46% APA Guar., indicated analysis 46.25% to 47% APA	40,000 M/T to 50,000 M/T.		60	60 days	See bid
O	Drexy Brook Export-Import Trade, Boston 15, Mass.		68.00	F.O.B. Vessel Tunisian port Sfax and/or Portugal port Lisbon, Portugal.		46%	10,000		15	60 days	See Notes on bid & letter
S	International Ore &Fertilizer Corp., New York 36, N. Y.		52.50	1.A.- 6,000 M/T - F.O.B. Vessel Tampa Range,		46%	Acc. Cl. 31,000		30	3000 during May & 3000 during June 1963.	
			56.50	1.B.- 25,000 M/T						5000 during late-May & 10,000 during June &10,000 during July 1963. Disc.- 15-10	
S	Lobel Chemical Corp. New York 6, N. Y.		51.64	F.O.B. Vessel, Tampa, Fla.		Minimum 46%	3,000		15	Within 45 days (April shipment)	Terms net cash vs. invoice, no discount. See letter
S	SATTECORP South American Minerals & Merchandise Corp. New York 22, N. Y.		56.31	Tampa, Florida		46%	25,000		15	60-120 days	*Delivery Schedule: 5,000 M/T- 2nd half May 10,000 M/T- June 1963 10,000 M/T- July 1963

NUMBER OF BIDS RECEIVED: 6
NUMBER OF SEALED BIDS RECEIVED:

LOWEST BID -
LOWEST ADVANCE BID
LOWEST ACCEPTABLE BID

TIE BIDS
ONLY BID
NO AWARD

REASON FOR REJECTING LOW BID MUST BE SHOWN ON REVERSE.

BID OPENING HELD BY

Signature Date

REVIEWED AND CONCURRED IN BY

Signature Date

GSA FORM 1419A

[339] EXHIBIT 35

ORDER

Sealed bids for the Furnishing of the Supplies or Services in the Schedule will be received at the place specified in Item 8, or if hand carried, in the depository located in	OFFER, AND AWARD (CONTRACT)	CONTRACT NO. / ORDER NO. (If any)	PAGE NO. 1	NUMBER OF PAGES 7

ISSUED BY: General Services Administration Federal Supply Service Procurement Operations Division MARK BID ENVELOPE LOWER LEFT CORNER:	ADDRESS: 7th and D Streets, S.W. Washington 25, D. C. Attention: Bid Room 7122 Invitation: FPNGC-B-29247-A-3-7-63

INVITATION FOR BIDS

DATE ISSUED: February 14, 1963 — INVITATION NO.: FPNGC-B-29247-A-3-7-63

Sealed bids in duplicate, subject to (1) the Terms and Conditions of the Invitation for Bids, (2) the accompanying Schedule, (3) General Provisions (Standard Form 32, Sept. 1961 edition), which are incorporated herein by reference, and (4) such other contract provisions and specifications as are attached or incorporated by reference in the Schedule, will be received at the above office until 3:30 o'clock P.M., E.S. Time, March 7, 1963 (Date) and at that time publicly opened for furnishing the supplies or services described in the accompanying Schedule, for delivery F.A.S. Vessel, U.S. Port of Shipment or F.O.B. Foreign Port. (GSA Form 1430 attached and made a part of this invitation).

General terms and provisions to which are subjected to the terms and conditions on this or these pages.

W. B. Minnick - Purchasing Agent — SCHEDULE — Worth 3-4834

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY ORDERED (Unless otherwise indicated)	UNIT	UNIT PRICE	AMOUNT
	RECIPIENT COUNTRY AND CODE: Korea - 489 PA/PR NO.: 489-235-901-3002 COMMODITY CLASS CODE: 235 AREA OF SOURCE: 901 FERTILIZER, Type and Quantity as shown on attached Continuation Sheet.				

BID

DATE OF BID: March 7, 1963

In compliance with the above, the undersigned offers and agrees, if this Bid be accepted within 60 calendar days (60 calendar days unless a different period is inserted by the bidder) from the date of opening, to furnish any or all of the items upon which prices are quoted, at the price set opposite each item, delivered at the designated point(s) within the time specified in the Schedule. Discounts will be allowed for prompt payment as follows:

_____ percent, 10 calendar days; _____ percent, 20 calendar days; _____ percent, 30 calendar days.

BIDDER REPRESENTS: (Check appropriate boxes)

(1) That he ☐ is, ☒ is not, a small business concern. (See definition on reverse hereof.) If bidder is a small business concern and is not the manufacturer of the supplies bid upon, he also represents that all supplies to be furnished hereunder ☐ will, ☐ will not, be manufactured or produced by a small business concern in the United States, its Territories, its possessions, or the Commonwealth of Puerto Rico.

(2) That he is a ☒ regular dealer in, ☐ manufacturer of, the supplies bid upon.

(3) (a) That he ☐ has, ☒ has not, employed or retained any company or person (other than a full-time bona fide employee working solely for the bidder) to solicit or secure this contract, and (b) that he ☐ has, ☒ has not, paid or agreed to pay any company or person (other than a full-time bona fide employee working solely for the bidder) any fee, commission, percentage or brokerage fee, contingent upon or resulting from the award of this contract; and agrees to furnish information relating to (a) and (b) above as requested by the Contracting Officer.

(For interpretation of the representation, including the term "bona fide employee," see Code of Federal Regulations, Title 32, Part 1804.)

(4) He operates as an ☐ individual, ☐ partnership, ☒ corporation, incorporated in the State of Delaware

NAME AND ADDRESS OF BIDDER (Street, city, state, and ZIP No. Type or print): Concentrated Phosphate Export Association, Inc., 230 Park Avenue, New York 17, New York

SIGNATURE OF PERSON AUTHORIZED TO SIGN BID: William J. Rabel

TYPE OR PRINT NAME AND TITLE OF SIGNER: William J. Rabel, Secretary

AWARD

ACCEPTED AS TO ITEMS NUMBERED: _____ AMOUNT: $ _____

DATE OF AWARD: _____

UNITED STATES OF AMERICA: BY _____ Contracting Officer

DELIVER ORDER FOR PAYMENT TO: As shown on Purchase Order(s).

ACCOUNTING AND APPROPRIATION DATA: As shown on Purchase Order(s).

PAYMENT WILL BE MADE BY: As shown on Purchase Order(s).

Award will be made on this Form, or on Standard Form 26, or by other official written notice.

GSA-WASH DC 63-10657

[340] TERMS AND CONDITIONS OF THE INVITATION FOR BIDS

1. PREPARATION OF BIDS.—(a) Bidders are expected to examine the drawings, specifications, Schedule, and all instructions. Failure to do so will be at the bidder's risk.

(b) Each bidder shall furnish the information required by the bid form. The bidder shall print or type his name on the Schedule and each Continuation Sheet thereof on which he makes an entry. Erasures or other changes must be initialed by the person signing the bid. Bids signed by an agent must be accompanied by evidence of his authority.

(c) Unit prices for each unit bid on shall be shown and such price shall include packing unless otherwise specified. A total shall be entered in the Amount column of the Schedule for each item bid on. In case of error in extension of prices, the unit price will govern.

(d) Alternate bids will not be considered unless authorized by the Invitation.

(e) When not otherwise specified, bidder must definitely state time of proposed delivery.

(f) Time, if stated as a number of days, will include Sundays and holidays.

2. SUBMISSION OF BIDS.—(a) Bids and modifications thereof shall be enclosed in sealed envelopes addressed to the issuing office, with the name and address of the bidder, the date and hour of opening, and the invitation number on the face of the envelope. Telegraphic bids will not be considered unless authorized by the Invitation; however, bids may be modified by telegraphic notice provided such notice is received prior to the time set for the opening of the bids.

(b) Samples of items, when required, must be submitted within the time specified, and unless otherwise specified by the Government, at no expense to the Government. If not destroyed by testing, samples will be returned at bidder's request and expense, unless otherwise specified by the Invitation.

(c) In the event no bid is to be submitted, do not return the Invitation unless otherwise specified. However, a letter or post card should be sent to the issuing office advising whether future Invitations for the type of supplies or services covered by this Invitation are desired.

3. WITHDRAWAL OF BIDS.—Bids may be withdrawn by written or telegraphic notice (see 4 below).

4. LATE BIDS.—Bids and modifications or withdrawals thereof received after the time set for opening will not be considered, unless they are received before the award is made, and it is determined by the Government that failure to arrive on time was due solely to delay in the mails for which the bidder was not responsible.

5. GOVERNMENT-FURNISHED PROPERTY.—No material, labor, or facilities will be furnished by the Government unless otherwise provided for in the Invitation.

6. LABOR INFORMATION.—Attention is invited to the possibility that wage determinations may have been made under the Walsh-Healey Public Contracts Act providing minimum wages for employees engaged in the manufacture for sale to the Government of the supplies covered by this Invitation for Bids. Information in this connection, as well as general information as to the requirements of the Act concerning overtime payment, child labor, safety and health provisions, etc., may be obtained from the Wage and Hour and Public Contracts Divisions, Department of Labor, Washington, D.C., 20210. Requests for information should state the Invitation number, the issuing agency and the supplies covered.

7. DISCOUNTS.—(a) Prompt-payment discounts will be included in the evaluation of bids, provided the period of the offered discount is sufficient to permit payment within such period in the regular course of business under the delivery, inspection, and payment provisions of the Invitation and Bid.

(b) In connection with any discount offered, time will be computed from date of delivery of the supplies to carrier when delivery and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when delivery and acceptance are at either of those points, or from date correct invoice or voucher is received in the office specified by the Government if the latter date is later than the date of delivery. Payment is deemed to be made, for the purpose of earning the discount, on the date of mailing of the Government check.

8. AWARD OF CONTRACT.—(a) The contract will be awarded to that responsible bidder whose bid, conforming to the Invitation for Bids, will be most advantageous to the Government, price and other factors considered.

(b) The Government reserves the right to reject any or all bids and to waive informalities and minor irregularities in bids received.

(c) The Government may accept any item or group of items of any bid, unless the bidder qualifies his bid by specific limitations. UNLESS OTHERWISE PROVIDED IN THE SCHEDULE, BIDS MAY BE SUBMITTED FOR ANY QUANTITIES LESS THAN THOSE SPECIFIED; AND THE GOVERNMENT RESERVES THE RIGHT TO MAKE AN AWARD ON ANY ITEM FOR A QUANTITY LESS THAN THE QUANTITY BID UPON AT THE UNIT PRICES OFFERED UNLESS THE BIDDER SPECIFIES OTHERWISE IN HIS BID.

(d) A written award mailed (or otherwise furnished) to the successful bidder within the time for acceptance specified in the bid shall be deemed to result in a binding contract without further action by either party.

9. SELLER'S INVOICES.—Invoices shall be prepared and submitted in quadruplicate unless otherwise specified. Invoices shall contain the following information: Contract and order number (if any), item numbers, description of supplies or services, sizes, quantities, unit prices and extended totals. Bill of lading number and weight of shipment will be shown for shipments made on Government bills of lading.

10. DEFINITION OF SMALL BUSINESS.—Generally, a small business concern for the purpose of Government procurement is a concern that (1) is not dominant in its field of operation and, with its affiliates, employs fewer than 500 employees, or (2) is certified as a small business concern by Small Business Administration. (*See Code of Federal Regulations, Title 13, Part 121, as amended, which contains the detailed definition and related procedures.*)

U.S. GOVERNMENT PRINTING OFFICE, 1971—O 714-899

INCORPORATION OF FORMS: Each of the following forms is hereby incorporated by reference and made a part of this Invitation for Bids, receipt of which is acknowledged by the bidder. Copies of each form, if not enclosed, are available upon request.

GSA Form 1246, Special Program Bidding Terms and Contract Provisions, March 1958 Edition.

GSA Form 1424, Supplemental Provisions, May 1962 Edition.

GSA Form 1424a, Addendum to General Provisions and Supplemental Provisions, November 1962 Edition.

GSA Form 1480, Definitions of Delivery Terms for Foreign Aid Procurement, October 1958 Edition.

GSA Form 1732, Bidder Affiliation and Identifying Data, June 1961 Edition.

GSA Form 1790, Subcontracting Programs, December 1962 Edition.

All references to the International Cooperation Administration in this Invitation for Bids, including attachments thereto, shall be deemed to be references to the Agency for International Development. Also, references to Executive Orders 10510, 10575, 10610 and 10625 shall be deemed to be references to Executive Order 10900.

1. CHANGES - GSA FORM 1246:

A. Article 2 is hereby deleted and the following substituted:

Source and Origin:

The bidder warrants and agrees that, with respect to source and origin, the equipment, parts, materials and supplies delivered under any contract resulting from this invitation shall be delivered from the following area: 901: When source and origin differ, bidder must state both the source and the origin of the equipment, parts, materials and supplies he intends to furnish.

Source and Origin Definitions:

The term "source" means the country or area from which a commodity is shipped to the cooperating country. Where, however, a commodity is shipped from a free port or bonded warehouse in the form in which received therein, source shall mean the country or area from which the commodity was shipped to the free port or bonded warehouse.

The term "origin" means the country or area in which the commodity is mined, grown or produced. A commodity is produced when, through manufacturing, processing or substantial and major assembling of components, a commercially recognized new commodity results that is substantially different from its component in basic characteristics or in purpose or in utility.

Area of Source Definitions:

World-Wide (Free World) (AID Geographic Code 899)

Any country in the world, except: Albania, Bulgaria, Cuba, China - excluding Taiwan (Formosa), but including Manchuria, Inner Mongolia, the Provinces of Tainghai and Sikang, Sinkiang, Tibet, the former Kwantung Leased Territory, the present Port Arthur Naval Base Area and Liaoning Province, Czechoslovakia, East Germany (including the Soviet Sector of Berlin), Estonia, Hungary, Latvia, Lithuania, North Korea, North Vietnam, Outer Mongolia, Poland and Danzig, Rumania and Union of Soviet Socialist Republics.

Limited World-Wide (AID Geographic Code 898)

Any country in the world, except those listed under World-Wide (Free World), Code 899, and except: Australia, Austria, Belgium, Canada, Denmark, France, Germany (Federal Republic), Hong Kong, Italy, Japan, Luxemburg, Monaco, Netherlands, New Zealand, Norway, Union of South Africa, Sweden, Switzerland and the United Kingdom.

World-Wide (AID Geographic Code 901)

Any country in the world, except those listed under World-Wide (Free World), Code 899, and except: Australia, Austria, Belgium, Canada, Denmark, France, Germany (Federal Republic), Italy, Japan, Luxemburg, Monaco, Netherlands, New Zealand, Norway, Union of South Africa, Spain, Sweden, Switzerland and the United Kingdom.

United States of America and Areas of Assdciated Sovereignty (AID Geographic Code 000)

Includes the United States of America, its possessions, Puerto Rico and the Trust Territories.

Special Area of Source

Restricted to the specific country(ies) or area(s) identified elsewhere in this invitation.

	Article No.	
B.	4(a)(1) and (3)	Delete addresses shown. Shipping instructions will be furnished by the Transportation and Communications Service shown in the Purchase Order.
C.	5, second subpar.	Delete. Payment will be made by the Regional Comptroller cited in the Purchase Order.
D.	4(a)(4)(5) 5(b)	Delete reference to Form NCA-200 (7-55). Not required.

GSA-WASH DC 63-10657

E. Article No. 7

Delete address of Transportation and Communications Service. The address of the Transportation and Communications Service will be shown in the Purchase Order.

F. Certification of Invoice:

The following certification on "source" and "origin" must be attached to or endorsed on each invoice presented for reimbursement and must be signed by the supplier or his authorized representative:

I (We) hereby certify that the "origin" (as defined by AID) of the commodities listed on the attached invoice or invoices herein is as shown below, that such "origin", as well as the "source" shown in Block 3 of AID Form 280, is included in the AID Geographic Code authorized in the procurement document under which this shipment is made and that this information is true and correct in all respects:

Origin of Commodities _____

Signed _____ Date _____

Title _____

2. METHOD OF AWARD: Bids will be evaluated on the basis of 46 percent P_2O_5 (APA) only. However, in the case of tie bids, preference will be given to the bid offering the highest percent of P_2O_5 (ABA).

3. PROGRESSIVE AWARDS: In the event it is found necessary to award partial quantities to fill the total quantities required within the time specified, awards will be made first to the lowest acceptable bidder for the quantity offered and then progressively to the next lowest acceptable bidder(s).

4. AVAILABILITY FOR INSPECTION AND SHIPMENT: The Government desires the material to be available for inspection and shipment within 45 days after Notice of Award. Bidder shall insert in the appropriate blank below, a definite number of days within which material will be available. If bidder does not indicate a specific number of days, his bid shall be deemed to offer availability as desired by the Government. Although time of availability for inspection and shipment will not be a factor in determining awards, any bid offering in excess of 60 days after Notice of Award will not be considered on the basis that it is unreasonable.

BIDDER'S PROPOSED INSPECTION AND SHIPMENT: 60 days after Notice of Award.

5. RESTRICTION - AREA OF SOURCE: Bids under this invitation are restricted to those offering materials and supplies from a source and origin not precluded under AID Geographic Code 901.

6. BARTER PROVISION: Any offer to supply commodities hereunder involving a sale price of $100,000.00 or more, made on a bid basis pursuant to an invitation for formal bids, and which expresses a willingness to accept surplus Agricultural Commodities from the Commodity Credit Corp., as full payment, in lieu of dollars, shall have preference over any other bid/offer where price and other terms of the bid/offer are equal. Bidders having such an agreement must state that fact in their bids and applications for letters of credit must provide that payments of such bidders' accounts will be made directly to the Commodity Credit Corporation.

STATEMENT OF AGREEMENT, if applicable, should be submitted on separate document attached to bid.

7. INSPECTION: Inspection details will be furnished through the Regional Office of GSA/Federal Supply Service in your area. The Government will perform inspection prior to shipment. Bidders are requested to insert location where such inspection may be made below.

8. DELIVERY POINT: Based on the delivery terms "Definitions of Delivery Terms for Foreign Aid Procurement" (GSA Form 1480). See below. F.A.S. Vessel, U.S. Port of Shipment or F.O.B. Vessel, Foreign Port.

9. EXPORT LICENSE: Export license, as may be required for material manufactured in and exported from U.S.A., will be obtained by Transportation and Public Utilities Service prior to issuance of shipping instructions.

10. DOCUMENTS: Commodity Class Code 235 and Requisition Number indicated in Purchase Order shall be included in Contractors' invoices and other pertinent documents.

BIDDERS ARE REQUIRED TO SUPPLY THE FOLLOWING INFORMATION

Item No.	Metric Tons	Production Point (City and State)	Inspection Point Name and Address of Plant	Delivery Point Port of Exit
1	Up to 9,000	Brewster, Fla.	American Cyanamid Co. Brewster, Fla.	Tampa Range, Fla.
	Up to 9,000	Bartow, Fla.	Davison Chemical Co. Bartow Fla.	Tampa Range, Fla.
	Up to 12,000	Bartow, Fla.	International Minerals & Chemical Corp. Bartow, Fla.	Tampa Range, Fla.
	Up to 15,000	East Tampa, Fla.	U. S. Phosphoric Products East Tampa, Fla.	Tampa Range, Fla.
	Up to 5,000	Nichols, Fla.	Virginia-Carolina Chemical Corp. Nichols, Fla.	Tampa Range, Fla.

GSA-

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Standard Form 36
Prescribed by General Services Administration, Nov. 1949 Edition

CONTINUATION SHEET
(SUPPLY CONTRACT)

CONTRACT, ORDER OR INVITATION NO. (As applicable)	PAGE NO.
FHGC-B-29247-A-3-7-63	7

ITEM NO.	SUPPLIES OR SERVICES	QUANTITY (Number and kind)	UNIT	UNIT PRICE	AMOUNT
1.	FERTILIZER, Triple Superphosphate, Commercial Granular, minimum of 46 percent P_2O_5 (APA), in bulk.....	Funds Controlling Metric 40,000	tons		
	Screened not more than 5% plus 6 mesh Tyler Screen " " " " 10% minus 20 mesh Tyler Screen Bidder to State Percent P_2O_5 46% APA Guaranteed, indicated analysis is 46.25% to 47% APA				
	All material to be fully cured and delivered F.A.S. or F.O.B. Vessel in a dry and free-flowing condition. Moisture not to exceed standard commercial allowable maximum.				
	Total Bulk Quantity Offered:				
	40,000 M/T			$55.18	$2,207,200.00
	F.O.B. Vessel, Tampa Range, Florida, spout trimmed only not filled or leveled				
	to				
	50,000 M/T			$55.18	$2,759,000.00
	F.O.B. Vessel, Tampa Range, Florida, spout trimmed only not filled or leveled				

NAME OF BIDDER OR CONTRACTOR

Concentrated Phosphate Export Association, Inc.

Standard Form 36
Rev. 1949 Edition

GSA-WASH DC 63-10557

[346] **BIDDER AFFILIATION AND IDENTIFYING DATA**

Each bidder will furnish the following information by filling in the appropriate blocks:

(1) Is the bidder owned or controlled by a parent company as described below?
[ ] Yes [X] No

(For the purpose of this bid, a parent company is defined as one which either owns or controls the activities and basic business policies of the bidder. To own another company means the parent company must own at least a majority (more than 50%) of the voting rights in that company. To control another company, such ownership is not required; if another company is able to formulate, determine, or veto basic business policy decisions of the bidder, such other company is considered the parent company of the bidder. This control may be exercised through the use of dominant minority voting rights, use of proxy voting, contractual arrangements, or otherwise.)

(2) If the answer to (1) above is "Yes," bidder will insert in the space below the name and principal office address of the parent company.

_____ Name

_____ Address

(3) Bidder will insert in the space(s) below the Employer's Identification Number (E. I. No.) (Federal Social Security Number used on Employer's Quarterly Federal Tax Return, U.S. Treasury Department Form 941).

E. I. No. of Bidder 13-1965774

E. I. No. of Parent Company (if any) _____

Concentrated Phosphate Export Association, Inc.
Name of Bidder

230 Park Avenue
New York 17, New York

FPNGC-B-29247-A-3-7-63
Invitation No.

[347]

GENERAL SERVICES ADMINISTRATION
FEDERAL SUPPLY SERVICE
PROCUREMENT OPERATIONS DIVISION
WASHINGTON 25, D. C.

February 21, 1963

Notice to Prospective Bidders

AMENDMENT NO. 1
INVITATION FOR BIDS FPNGC-B-29217-A-3-7-63

Invitation FPNGC-B-29217-A-3-7-63 covering definite quantity purchase of Fertilizer, triple superphosphate, issued February 14, 1963 for opening 3:30 P.M. E. S. T. March 7, 1963 is changed as follows:

1. Page 1 - Delivery Terms:

Delete: Delivery F.A.S. Vessel U.S. Port of shipment or F.O.B. Foreign Port

Add: Bids are requested for delivery F.A.S. or F.O.B. Vessel U.S. Port of shipment or F.O.B. Vessel Foreign Port

All other terms and conditions of the Invitation for Bids remain unchanged.

BIDDERS SHALL ACKNOWLEDGE RECEIPT BY SIGNATURE HEREUNDER IN THE SPACE PROVIDED AND RETURN IN DUPLICATE IN TIME FOR BID OPENING. FAILURE TO SIGN AND RETURN THIS AMENDMENT IN TIME FOR BID OPENING SHALL CAUSE REJECTION OF BIDS.

RECEIPT ACKNOWLEDGED
Concentrated Phosphate Export Association, Inc.
230 Park Avenue, N. Y. 17, N. Y.
Name of Firm

William J. Cahill
Secretary
Signature and Title

March 7, 1963
Date

GSA-WASH DC 63-11173

[348-397] GENERAL SERVICES ADMINISTRATION - FEDERAL SUPPLY SERVICE

DEFINITIONS OF DELIVERY TERMS FOR FOREIGN AID PROCUREMENT

TERMS OF DELIVERY - F.A.S. VESSEL, PORT OF SHIPMENT: The term "F.A.S. Vessel, Port of Shipment" means:

(a) Delivered, free of expense to the Government, alongside overseas vessel and within reach of its loading tackle;

(b) That it shall be the responsibility of the contractor to do the following:

(1) Place goods alongside vessel or on dock designated (within reach of vessel's loading tackle) and provided by or for the Government on date or within the period fixed; assume and pay any heavy lift or other charges, where necessary, up to this point;

(2) Provide clean dock or ship's receipt;

(3) Be responsible for any loss or damage, or both, until goods have been delivered alongside the vessel, or on the dock, within reach of vessel's loading tackle;

(4) Render the Government, at the Government's request and expense, assistance in obtaining the documents issued in the country of origin, or of shipment, or of both, which may be required either for purposes of exportation, or of importation at destination.

TERMS OF DELIVERY FOR MATERIAL SHIPPED F.O.B. VESSEL, PORT OF SHIPMENT: The term "F.O.B. Vessel, Port of Shipment" means:

(a) Loaded and stowed or trimmed on board overseas vessel at named port of shipment, free of expense to the Government;

(b) That it shall be the responsibility of the contractor to do the following:

(1) Provide for, and pay and bear all charges incurred in, placing goods actually on board the vessel designated and provided by or for the Government on the date or within the period fixed;

(2) Provide clean on-board ocean bill of lading;

(3) Be responsible for any loss or damage, or both, until goods have been placed actually on board the vessel on the date or within the period fixed;

(4) Render the Government, at the Government's request and expense, assistance in obtaining the documents issued in the country of origin, or of shipment, or of both, which may be required either for purposes of exportation or of importation at destination.

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EXHIBIT 41

GENERAL SERVICES ADMINISTRATION
FSS, POD, FPNGC, WASHINGTON 25, D. C.
CO.118.3-3.21459.273

ADDRESSES LISTED ON ATTACHED SHEET—7
AWARDS TO THOSE BIDDERS ON IFB FPNGC-B-20947-A-3-7-63, FERTILIZER SUPERPHOSPHATE, WHOSE PRICES AND DELIVERY TIMES WERE CONSIDERED ACCEPTABLE HAVE BEEN MADE FOR 36,000 METRIC TONS. AN ADDITIONAL QUANTITY OF THIS MATERIAL IS NOW NEEDED. REQUEST YOUR OFFER ON 6000 METRIC TONS (FUNDS CONTROLLING) FERTILIZER, SUPERPHOSPHATE IN ACCORDANCE WITH SAME TERMS AND CONDITIONS AS SET FORTH IN INVITATION FOR BIDS FPNGC-B-20947-A-3-7-63, EXCEPT THAT MATERAL SHALL BE AVAILABLE FOR INSPECTION AND SHIPMENT WITHIN THIRTY DAYS AFTER NOTICE OF AWARD. CONTRACTS WILL BE CONSUMMATED BY NEGOTIATION. YOUR OFFER SHOULD BEAR SOLICITATION NUMBER FPNGC-B-20947-N-4-11-63. OFFERS ARE TO BE RECEIVED BY BUSINESS SERVICE CENTER, BID ROOM 7122, SEVENTH AND D STREETS, S. W. WASHINGTON 25, D. C. NOT LATER THAN 5:00 P.M., EST, APRIL 11, 1963. TELEGRAPHIC OFFERS ARE ACCEPTABLE.

ROLLAND H. RIFE, CHIEF
CHEMICAL, MEDICAL & DRUG SECTION
GENERAL PRODUCTS BRANCH

[COPY ILLEGIBLE]

R. H. RIFE

[399-406]

CENTRAL RESOURCES CORP.
120 WALL STREET
NEW YORK, NEW YORK

CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC.
230 PARK AVENUE
NEW YORK 17, NEW YORK

LOBEL CHEMICAL CORP.
165 BROADWAY
NEW YORK 6, NEW YORK

EVSEY BROOK EXPORT-IMPORT
341 MARLBOROUGH STREET
BOSTON 15, MASSACHUSETTS

INTERNATIONAL ORE & FERTILIZER
500 FIFTH AVENUE
NEW YORK 18, NEW YORK

WOODWARD & DICKERSON, INC.
1400 SO. PENN. SQUARE
PHILADELPHIA 2, PENNA.

SOUTH AMERICAN MINERALS AND MERCHANDISE
425 PARK AVENUE
NEW YORK 22, NEW YORK

[407] EXHIBIT 44

RVA003 007A EST APR 11 63 NHC003 SPOC004 PB333
P CDU781 NL PD NEW YORK NY 10
GENERAL SERVICES ADMINISTRATION BUSINESS SERVICE CENTER BID ROOM 7122 SEVENTH AND D STS SOUTHWEST WASHDC
RE SOLICITATION NUMBER FPNGC-B-39247-N-4-11-63 WE OFFER 6000 METRIC TONS GRANULAR TRIPLE SUPER PHOSPHATE MINIMUM GUARANTEE 46 PERCENT P205 SCREENED NOT MORE THAN 5 PERCENT PLUS 6 MESH TYLER SCREEN NOT MORE THAN 10 PERCENT MUNUS 20 MESH TYLER SCREEN AT $55.18 PER METRIC TON FOB VESSEL TAMPA RANGE FLORIDA SPOUT TRIMMED ONLY NOT FILLED OR LEVELED INSPECTION AND SHIPMENT BETWEEN MAY 5 AND MAY 18 1963
CONCENTRATED PHOSPHATE EXPORT ASSOCIATION 280 PARK AVE NEW YORK NY

FPNGC-B-39247-N-4-11-63 6000 46 P205 5 6 10 20 $55.18 5 18

[408] CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC.

230 Park Avenue

New York 17, New York

TELEPHONE: Murray Hill 6-4415
CABLES: PHOSEXFO

April 10, 1963.

General Services Administration

Business Service Center

Bid Room 7122

Seventh & D Streets, S. W.

Washington 25, D. C.

Re: Solicitation No.: FPNGC-B-29247-N-4-11-63.

Gentlemen:

In response to your telegram, we offer 6,000 metric tons of Granular Triple Superphosphate, guaranteed minimum of 46% P_2O_5, screened not more than 5 percent plus 6 mesh Tyler Screen and not more than 10 percent minus 20 mesh Tyler Screen, at $55.18 per metric ton, f.o.b. Vessel, Tampa Range. Florida, spout trimmed only. Any leveling or filling required will be for the buyers account. Inspection and shipment will be made between May 5 and May 18, 1963.

Following are the manufacturers who will supply this material if we are granted the award:

Manufacturer	Plant Address
American Cyanamid Company	Brewster, Florida
Davison Chemical Division of W. R. Grace Chemical Company	Bartow, Florida
International Minerals & Chemical Corp.	Bonnie, Florida
U. S. Phosphoric Products Division of Tennessee Corporation	East Tampa, Florida
Virginia-Carolina Chemical Corporation	Nichols, Florida

Very truly yours, W. J. Rabel, Secretary.

WJR/vc

[409] CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC.

230 Park Avenue

New York 17, New York

April 22, 1963.

TELEPHONE: Murray Hill 6-4415
CABLE: PHOSEXPO

Mr. R. Farkas

General Service Administration

Business Service Center

Seventh & D Streets, S. W.

Washington 25, D. C.

Re: Solicitation No.: FPNGC-B-29247-N-4-11-63

Dear Mr. Farkas:

Please refer to our letter of April 10 wherein we offered you 6,000 metric tons of Granular Triple Superphosphate, guaranteed minimum of 46½% P_2O_5, at $55.18 per metric ton, f.o.b. Vessel, Tampa Range, Florida, spout trimmed only.

Will you please change the price to read $53.25 per metric ton, f.o.b. Vessel, Tampa Range, Florida, spout trimmed only.

Very truly yours, W. J. Rabel, Secretary.

WJR/vc

[410-428]

RVA034 411P EDT APR 29 63 RB215
R NA299 PD NEW YORK NY 29 317P EST
GENERAL SERVICES ADMINISTRATION, BUSINESS SERVICE CENTER BID ROOM
7123 7 AND D STS SOUTHWEST WASHDC
RE FPNGC-B-29347N4-11-63 WE CONFIRM OUR LETTER APRIL 22 1963 OFFERING
6000 METRIC TONS GRANULAR TRIPLE SUPERPHOSPHATE GUARANTEED MINI-
MUM 46 PERCENT APA IN BULK AT $53.25 PER METRIC TON FOB VESSEL TAMPA
RANGE FLORIDA SPOUT TRIMMED ONLY SHIPMENT MAY 5 MAY 18 1963

CONCENTRATED PHOSPHATE EXPORT ASSN.

[429] EXHIBIT 46

ICA Small Business Memo

Trade Information for American Suppliers

Issued by Office of Small Business, International Cooperation Administration

Washington 25, D. C. STerling 3-6400—Ext. 3145

All ICA Financed Shipments must be marked in accordance with the requirements of ICA Regulation I.

REVISION #3 of

SBM No. 56-1

September 7, 1961

(M/L: Entire OSB List)

This memorandum supercedes all other previous issuances in this number series (SBM 56-1, and Revisions 1 and 2 thereto).

Indirect Methods of Selling in Foreign markets . . . Item 1
Six Points to be Considered in Exporting . . . . . Item 2

ITEM 1

INDIRECT SELLING in foreign fields is conducted by selling to or through American export firms, American export agents, American export associations, combination export managers, foreign companies' purchasing agents in the United States or foreign sales representatives. It has advantages which appeal particularly to the United States manufacturer who is not ready to undertake a considerable direct investment in selling abroad. As against this are the disadvantages associated with any less expensive method of doing business.

1. *Probable Advantages:*

a. Economy. Indirect selling is generally less costly in out-of-pocket disbursements and should help to keep down overhead. You may avoid many details

of expense and be able to deal with a limited number of customers, including some located in the United States, where they can be reached with less expense.

b. Simplicity. Indirect selling is less elaborate in every respect, and particularly in the matter of handling shipments.

2. *Possible Disadvantages*:

a. Remoteness. The indirect seller may be out of direct touch with his ultimate foreign customers.

b. Lack of Control. Once goods are sold to a buyer for foreign resale, the manufacturer's control over them ceases, unless he has stipulated conditions as to resale prices, servicing of the product, advertising, etc. This places a heavy premium on picking reliable firms to deal with.

c. Reduced gross profit. Since a considerable number of the functions of exporting are handled by the firm to which goods are sold (e.g. credits, preparing shipments, overseas transportation . . .), a portion of the manufacturer's potential gross profit naturally goes to him to help defray these costs of operation, but these costs might well be less than the manufacturer's expenses in doing his own exporting. Which way net profit is affected depends on how efficiently the manufacturer could operate in direct selling.

3. *Channels of Indirect Selling.* Following are the principal channels open to the manufacturer who wishes to sell indirectly for export, with a brief description of the functions of each;

a. The Export Commission House should be mentioned because its functions occasionally form a part of the business of other operators. Originally the export commission merchant was a buying agent in the United States for foreign customers. As such he assumed all credit risks. Usually he facilitated shipments. An executor of purchasing commissions, rather than a creative seller, he was most useful to producers who did not need or could not afford to create a demand abroad.

[430] In dealing with an export commission house, you

may be only one of many sources of supply and you may have no control over the placing of orders. A form of export commission house has recently arisen, which acts not only as purchasing agent for a foreign importer, but for some manufacturers as selling agent. Such houses may even seek to represent a number of competing manufacturers. They may or may not assume credit risks.

b. The Manufacturer's Export Agent. An agent, a firm or individual located in the United States (though sometimes with foreign offices) selling on commission for the manufacturer. This agent is primarily a salesman, hence is most useful in the export of specialty products. His usefulness as a creative seller may, however, be limited by his undertaking to represent too many lines for adequate attention to all of them. He may or may not finance orders and/or assume credit risks. Most agents can handle the entire activity for their employers, including the various functions outlined under "Combination Export Manager" below.

c. The Export Merchant is a merchant, buying and selling for his own account in the expectation of reselling abroad. He assumes all credit risks and carries on the operation of shipping. He can be useful to the manufacturer whose volume will not permit direct selling abroad, yet whose product has features that lend themselves to constructive selling.

d. Export Associations. The Export Trade Act, usually known as the Webb-Pomerene law, authorizes the organization and operation of cooperative business associations to engage in export trade, and, with certain restrictions, grants such associations an exemption from the antitrust laws. The Webb law associations are required to limit their operations solely to export trade to foreign countries, and therefore they may not do business in import trade or in trade within the United States or any of its Territories or Possessions or between the United States and the latter.

The associations operating under this law have achieved many advantages in their efforts to build

up a profitable export trade, among which are agreements upon price and terms of sale to foreign buyers, the centralizing of sales effort or the setting up of a joint sales organization, thus making possible economies in sales costs, the better handling and filling of large orders, cooperation in such matters as packing, storage and warehousing, freight rates, cargo space, insurance, standardization of goods and inspection before shipment, the handling of claims of buyers, the adjustment of matters relating to credit, currency exchange, foreign government regulations and restrictions, tariffs quotas, etc., and many other things.

Inquiries as to the operation of the Export Trade Act, and requests for conferences looking toward the organization of new associations, should be addressed to the Division of Export Trade, U.S. Federal Trade Commission, Washington, D.C.

e. The Combination Export Manager. The combination export manager is an independent export executive or organization serving as export manager or department for two or more firms with the principal's status being that of client, not of direct employer.

The combination export manager handles most or all of the entire export functions for the principal—i.e.—the selection of foreign agents; direction of foreign advertisement and promotion; handling of billing, financing and shipping details; and performing all other functions of an export department for a fee or commission, according to the particular arrangement with each client. The combination export manager frequently assumes credit risks, or may be furnished funds by the principal for the various major expenses in connection with each export shipment.

The number of combination export managers has increased greatly of recent years because of the success with which men of high calibre have handled combined functions. Export management calls for skill and experience of a high order, and capable export managers do not come cheaply. By contributing

to the salary and expenses of a competent man and his staff, each participating company can get a far better grade of service than would be possible at an expense commensurate with small export sales volume.

Although most of the business transacted under the ICA program is through regular commercial channels, a portion is still carried out through governmental missions and agencies. A list of foreign government purchasing missions and other official agencies under foreign government supervision which are engaged in purchasing goods and services may be obtained from the U.S. Department of Commerce.

How to Get in Touch with prospective distributors, agents or salesmen for export selling: Lists of firms abroad engaged in the import business are obtainable from the Office of Trade Promotion, Bureau of Foreign Commerce, U.S. Department of Commerce, Banks, Chambers of Commerce, and other business service groups also may have valuable helps for new exporters. It is the occasional practice to advertise for agents abroad in export trade journals, or in local trade journals and newspapers abroad. Responses to such advertising should be carefully checked by personal interview, wherever possible, and not by letter alone.

[431] Foreign Freight Forwarder

The technical details connected with the handling of a shipment of goods for export have given rise to employment by many sellers of a type of organization known as the foreign freight forwarder who is prepared to render valuable assistance. A competent and reliable freight forwarder is equipped to look after numerous phases of the shipping problem for the exporter, including all functions connected with transferring, documenting, and dispatching. He is well informed on ocean freight rates applying from the ports through which the exporter's merchandise moves, and can advise authoritatively on all ocean shipping matters. His activities keep him in constant touch with the many conditions of entry in foreign countries. He is prepared, therefore, to execute efficiently all necessary foreign consular and other documents.

Forwarders may handle a shipment simply through the port of export or, by means of their correspondents abroad,

take care of the shipment to virtually any destination overseas. Unless the business of the exporting company justifies the maintenance of an export office at one or more ports in the United States, the services of a forwarder usually are employed to take care, at least, of all details connected with clearance.

The forwarder is prepared to assist the shipper in proper packing, marking, invoicing, and other matters to meet the requirements of the buyer and those of foreign governments. He takes over inland transportation of the goods to the most favorable port of exit in the most economical way. He arranges for transfer of the shipment upon arrival at the port, attends to customs clearance, arranges for vessel space and insurance coverage, and takes care of the preparation of consular invoices and often banking and collection papers. Some forwarders perform many related activities, such as banking, financing, insurance, warehousing, customs brokerage, and general counsel in foreign trade matters.

Firms interested in procuring the services of a foreign freight forwarder can obtain a complete list of those forwarders who have, in accordance with the Maritime Administration General Order No. 72, registered with the Administration and received a registration number, by writing the Maritime Administration, 14th Street between E Street and Constitution Avenue, N.W., Washington 25, D.C.

The Federal Maritime Board of the U.S. Department of Commerce has issued a revised list of ocean freight forwarders registered pursuant to Federal Maritime Board General Order 72.

The list is compiled in alphabetical order by city, listing the registered ocean freight forwarders in each city, and telling whether it is the main or a branch office of the forwarder. The list may be obtained gratis from the secretary, Maritime Administration, Washington, D.C.

ITEM 2

Exporting Under ICA Financing

Whether done under ICA financing or otherwise, the exporter should take certain precautions to make sure that all the necessary conditions preliminary to processing an order are complied with.

ICA's Office of Small Business has from time to time received complaints from firms which have been informed by buyers or agents abroad that certain transactions were being financed by the International Cooperation Administration only to discover—after the commodities were produced—that no ICA subauthorization or letter of credit was forthcoming. Many United States sellers do not realize that foreign buyers are sometime over-optimistic about the chance of getting dollar allocations for the products they wish to import. For this reason every supplier should be certain that each of the six steps described below is taken before he proceeds to fill any order to be financed by ICA.

Step One

Supply the foreign buyer with full information on your product and its price to assist him in getting an import permit.

Step Two

In executing a definite sale contract or accepting an order be sure that it is contingent upon:

(1) Your getting an export license, if required; (2) Your customer getting an import permit, if required; and (3) Your receipt of an irrevocable, confirmed letter of credit issued by a United States Bank.

[432-433] *Step Three*

Secure an export license, if necessary.

Step Four

Await the import permit number (if required) from your customer indicating that he has obtained the permit.

Step Five

Make no commitments for raw materials and do not start manufacturing until you actually receive the export license, import license number and letter of credit.

Check all of them carefully and compare them with the contract. If everything is correct, you can then process the order in your plant. If not, immediately inform the buyer and request that the necessary changes be made in the letter of credit.

Step Six

Read the ICA Regulations. Prepare your order for shipment; then ship, and invoice your goods exactly as provided for in the letter of credit. Take the shipping documents required by your letter of credit to the U.S. Bank issuing the letter of credit, accompanied by ICA Form 280, filled out as instructed by ICA Regulations, and obtain payment from the bank in dollars.

Procurement 1047-C (October, 1961)

Bids solicited for approximately 70,000 M/T of Phosphatic Materials

(Fund controlling quantity)

Total Awards: 96,325 M/T

Supplier	Port	Date of Shipment	Metric Tons Offered**	FOB Price (M/T)	Award M/T
CPEA*	Tampa	Dec./Feb.	100,000 1/	66.47	96,325
CPEA*	"	Feb.	20,000 1/	67.80	
CPEA*	"	Dec.	10,000 1/	66.25	
CPEA*	"	Dec.	10,000 1/	65.25	
CPEA*	"	Dec.	10,000 1/	66.90	
CPEA*	"	Feb.	30,000 1/	67.80	
CPEA*	"	Feb.	10,000 1/	67.75	
CPEA*	"	Dec./Feb.	5,000 1/	69.46	
CPEA*	"	Dec./Feb.	5,000 1/	69.46	
CPEA*	"	Dec./Feb.	5,000 1/	69.46	
CPEA*	"	Dec./Feb.	5,000 1/	69.46	
CPEA*	"	Feb.	20,000 1/	67.80	
CPEA*	"	Feb.	20,000 1/	67.80	
CPEA*	"	Feb.	10,000 1/	70.60	
CPEA*	"	Feb.	15,000 1/	69.29	
CPEA*	"	Dec./Feb.	20,000 1/	69.46	
Smith-Douglass*	Norfolk	Feb.	20,000 2/	30.45	
Stauffer*	Los Angeles	Feb.	30,000 3/	50.55	
Davison*	Baltimore	60 days	20,000 4/	28.20	

*Supplier not a bidder. Listed prices and quantities were computed and bid by various U. S. and foreign brokers.

**20,000 M/T were offered for shipment from "Europe" at a price of $71.00 but without designating the supplier or the loading port in Europe. The bid was not included by OSROK in its tabulation of bids.

1/ Triple Superphosphate
2/ Calcium Superphosphate
3/ Single Superphosphate
4/ Normal Superphosphate

[435]

Procurement 2001-N (February, 1962)

Bids solicited for approximately 40,000 M/T of TSP

(Fund controlling quantity)

Total Awards: 78,516 M/T

Supplier	Port	Date of Shipment	Metric Tons Offered	FOB Price (M/T) (Bagged/Bulk)	Award M/T
SIAPE*	Tunisia	April	10,000	64.00/57.00	10,000
CPEA*	Tampa	April	3,500	/59.79	3,500
CPEA*	"	May	5,000	/59.79	5,000
CPEA*	"	April	10,000	63.80/58.50	10,000
CPEA*	"	April	8,000	/61.93	
CPEA*	"	April	20,000	63.71/57.78	
CPEA*	"	April	10,000	/60.29	
CPEA*	"	April	40,000	/61.93	12,016
CPEA*	"	April	10,000	/61.93	
CPEA*	"	April	20,000	64.17/58.47	20,000
CPEA*	"	April	20,000	63.80/58.50	18,000
Shell*	Seattle	April	9,100	/78.06	

*Supplier not a bidder. Listed prices and quantities were computed and bid by various U. S. and foreign brokers.

[436] Procurement 2035-N (April, 1962)

Bids solicited for approximately 50,000 M/T of Phosphatic Materials

(Fund controlling quantity)

Total Awards: 102,670 M/T

Supplier	Port	Date of Shipment	Metric Tons Offered	FOB Price (M/T) Bag/Bulk	Award M/T
CPEA*	Tampa	June 15	10,000 1/	64.38/57.77	10,000
CPEA*	"	June 15	10,000 1/	/58.60	
CPEA*	"	July 15	10,000 1/	/58.60	
CPEA*	"	June 15	9,750 1/	64.40/58.40	
CUF*	Portugal	June 15	10,000 1/	60.50/58.20	10,000
CUF*	"	June 15	8,000 1/	67.50/59.10	2,770
Windmill*	Holland	June 15	3,000 1/	67.50/59.10	
SIAPE*	Tunisia	June 15	4,000 1/	67.50/59.10	
Guano-Werke*	Germany	June 15	2,000 1/	59.00/55.50	2,000
Albatros*	Holland	June 15	8,000 1/	58.50/57.60	
Armour*	Tampa	June 15	5,000 1/	/55.93	5,000
Smith-Douglass*	Norfolk	June 15	13,500 2/	24.27/20.54	
CUF*	Portugal	June 15	10,000 2/	20.38/20.50	10,000
CUF*	"	June 15	10,000 2/	20.38/21.50	10,000
CUF*	"	June 15	10,000 2/	23.25/22.50	
Olin-Mathieson*	U. S.	June 15	10,000 2/	/21.17	
Not Specified*	Japan	June 15	47,900 2/	26.89/	47,900
Not Specified*	"	June 15	5,000 2/	/26.39	5,000
Not Specified*	"	June 15	18,000 2/	28.89/	
Not Specified*	"	June 15	7,400 2/	29.89/	
Not Specified*	"	June 15	8,000 3/	35.50/	

*Supplier not a bidder. Listed prices and quantities were computed and bid by various U. S. and foreign brokers.

1/ Triple Superphosphate
2/ Single Superphosphate
3/ Magnesium Phosphate

[437] Procurement 2075-N (August, 1962)

Bids solicited for approximately 200,000 M/T of TSP

(Fund controlling quantity)

Total Awards: 179,500 M/T

Supplier	Port	Date of Shipment	Metric Tons Offered	FOB Price (M/T)	Award M/T
CPEA*	Tampa	Jan. 31, 1963	3,750	53.85	3,750
CPEA*	"	"	1,750	53.30	1,750
CPEA*	"	"	2,250	54.10	2,250
CPEA*	"	"	2,250	53.95	2,250
CPEA*	"	"	30,000	54.01	30,000
CPEA*	"	"	30,000	53.63	
CPEA*	"	"	6,000	54.90	
CPEA*	"	"	6,000	54.70	
CPEA*	"	"	5,500	55.10	
CPEA*	"	"	9,000	54.55	
CPEA*	"	"	3,500	55.20	
CPEA*	"	"	4,500	54.45	4,500
CPEA*	"	"	6,500	54.55	6,500
CPEA*	"	"	5,000	54.55	5,000
CPEA*	"	"	13,000	54.85	13,000
CPEA*	"	"	12,000	54.95	12,000
CPEA*	"	"	12,000	55.05	12,000
CPEA*	"	"	7,000	55.05	7,000
CPEA*	"	"	20,000	54.24	
CPEA*	"	"	20,000	54.24	
CPEA*	"	"	10,000	54.24	
CPEA*	"	"	10,000	54.24	
CPEA*	"	"	4,500	53.40	4,500
CPEA*	"	"	4,500	53.50	4,500
CPEA*	"	"	4,500	54.03	4,500
CPEA*	"	"	3,500	54.55	3,500
CPEA*	"	"	3,000	54.65	2,500
CPEA*	"	"	5,000	54.75	
CPEA*	"	"	5,000	54.85	
CPEA*	"	"	10,000	53.43	
CPEA*	"	"	6,000	54.57	
CPEA*	"	"	5,500	54.57	
CPEA*	"	"	9,000	54.57	
CPEA*	"	"	6,000	54.57	
CPEA*	"	"	30,000	54.15	30,000
CPEA*	"	"	30,000	54.15	
S.A.P.E.C.*	Portugal	"	5,000	52.70	
Armour*	Tampa	"	30,000	53.53	30,000
Wilson & Toomer	Tampa	"	15,000	52.05	

*Supplier not a bidder. Listed prices and quantities were computed and bid by various U. S. and foreign brokers.

[438]

Procurement 29247-A (March, 1963)

Bids solicited for approximately 30,000 M/T of TSP

(Fund controlling quantity)

Total Awards: 36,000 M/T

Supplier	Port	Date of Shipment	Metric Tons Offered	FOB Price (M/T)	Award M/T
Not specified*	Tunisia	Immediate	20,000	50.00	20,000
Not specified*	Portugal	Immediate	10,000	50.00	10,000
CPEA	Tampa	60 days	50,000	55.18	
American Ag. & Chem.*	Tampa	45 days	3,000	51.84	3,000
American Ag. & Chem.*	Tampa	May-June	6,000	52.50	3,000
Armour*	Tampa	May-July	25,000	56.50	
Armour*	Tampa	May-July	25,000	56.31	
Not specified*	Tunisia or Portugal	60 days	10,000	68.00 (Bagged)	

Procurement 29247-N (April, 1963)

Bids solicited for approximately 6,000 M/T of TSP

(Fund controlling quantity)

Total Awards: 6,000 M/T

Supplier	Port	Date of Shipment	Metric Tons Offered	FOB Price M/T	Award M/T
Not specified*	Tunisia or Portugal	30 days	10,000	49.50	6,000
CPEA	Tampa	30 days	6,000	53.25	
Not specified*	Algeria, Morocco, Portugal	50 days	6,000	68.00	
Armour*	Tampa	June	6,000	55.35	
American Ag. & Chem.*	Tampa	45 days	3,000	54.75	
Swift*	Tampa	July	4,000	48.92	

*Supplier not a bidder. Listed prices and quantities were computed and bid by various U. S. and foreign brokers.

[439] Procurement 3057-N (July, 1963)

Bids solicited for approximately 10,000 M/T TSP for August delivery and 110,000 M/T for final delivery period

(Fund controlling quantity)

Total Awards: 241,200 M/T

Supplier	Port	Date of Shipment	Metric Tons Offered		FOB Price (M/T)	Award M/T
CPEA*	Tampa	July/Aug.	2,000		52.90	2,000
CPEA*	"	"	2,000		52.94	2,000
CPEA*	"	"	2,000		52.98	
CPEA*	"	"	2,000		53.02	
CPEA*	"	"	1,000		53.06	
CPEA*	"	"	1,000		53.10	
CPEA*	"	"	1,000		53.14	
CPEA*	"	"	11,000		53.05	
CPEA*	"	"	2,000		52.80	
CPEA*	"	"	9,000		52.98	
CPEA*	"	"	11,000		53.28	
CPEA*	"	"	11,000		53.34	
CPEA*	"	"	11,000		52.97	4,000
Simplot*	"	"	11,000		63.30	
Armour*	"	"	11,000		54.19	
Royster*	"	"	2,000		52.80	2,000
SIAPE*	Sfax, Tunisia	March	10,000		50.00	
SIAPE*	"	April	10,000		50.00	
SIAPE*	"	May	10,000		50.00	
Swift & Co.*	Tampa	September	1,000		50.35	1,000
Swift & Co.*	"	October	1,000		50.41	1,000
American Agri. Chem. Co.*	"	September	10,000		50.42	10,000
Swift & Co.*	"	October	1,000		50.48	1,000
SIAPE*	Sfax, Tunisia	December	10,000		50.50	10,000
Swift & Co.*	Tampa	November	1,000		50.56	1,000
Swift & Co.*	"	November	1,000		50.60	1,000
Swift & Co.*	"	December	1,000		50.64	1,000
Swift & Co.*	"	December	1,000		50.68	1,000
Swift & Co.*	"	December	1,500		50.72	1,500
SIAPE*	Sfax, Tunisia	January	10,000		50.75	10,000
Swift & Co.*	Tampa	January	1,000		50.78	1,000
Swift & Co.*	"	January	1,000		50.82	1,000
Swift & Co.*	"	January	1,500		50.86	1,500
SIAPE*	Sfax, Tunisia	February	10,000		51.00	10,000
CPEA	Tampa	June/July				
		Aug./Dec.	240,000		51.00	157,500
CPEA	"	June/July			51.00	1,200
		Aug./Dec.	240,000	alternate		
CPEA	"	Aug./Feb.	240,000	alternate	51.50	
CPEA	"	Aug./Feb.	240,000	alternate	51.50	18,500
Swift & Co.*	"	Sep./Nov.	2,000		51.07	2,000
American Agri. Chem. Co.*	"	Sep./Dec.	10,000		51.43	
Swift & Co.*	"	Not specified	3,000		51.60	
Armour Agri. Chem. Co.*	"	Aug./Jan.	50,000		52.27	
Royster*	"	Aug./Oct.	3,000		52.45	
Central Farmers Fert. Co.*	Portland, Ore.	Oct./Nov.	10,000		64.88	
Simplot*	"	Oct./Feb.	12,000		64.97	
Western (Stauffer) Phosphate, Inc.*	"	Oct./Feb.	10,000		66.61	

*Supplier not a bidder. Listed prices and quantities were computed and bid by various U. S. and foreign brokers.

[440] Procurement 29849-A (March, 1964)

Bids solicited for approximately 50,000 M/T of DAP

(Fund controlling quantity)

Total Awarded: 500 M/T

Supplier	Port	Date of Shipment	Metric Tons Offered	FOB Price (M/T)	Award M/T
CPEA	Tampa	June	20,000	86.95	
CPEA	Tampa	June	25,000	86.95	
CPEA	Tampa	June	3,000	86.95	
Not specified	Long Beach	60 days	2,400	98.96	
J R Simplot*	Portland	60 days	2,400	99.57	
J R Simplot*	Stockton, Cal.	60 days	2,400	99.68	
J R Simplot*	Long Beach	75 days	2,400	98.96	
J R Simplot*	Portland	75 days	2,400	99.57	
J R Simplot*	Stockton, Cal.	75 days	2,400	99.68	
Kaiser*	San Diego	75 days	1,000 1/	120.27	
Kaiser*	Long Beach	75 days	1,000 1/	120.67	
Kaiser*	San Diego	100 days	1,000 1/	108.24	
Kaiser*	Long Beach	100 days	1,000	108.64	
Kaiser*	San Diego	130 days	1,000	107.24	
Kaiser*	Long Beach	130 days	1,000	107.64	
Armour*	Mobile	July	10,000	94.24	
Deere*	Tampa	75 days	500	88.74	500
Fert. del Istmo*	Mexico	July/Aug.	4,000	106.01	
Not specified	Los Angeles	75 days	2,000	116.98	
Swift*	New Orleans	July	2,000	83.43	
Fert. del Istmo*	Mexico	July	2,000	105.00	
Smith-Douglass*	Houston	Apr./June	1,000 2/	90.00	

*Supplier not a bidder. Listed prices and quantities were computed and bid by various U. S. and foreign brokers.

1/ Analyzing 21-53-0 (nitrogen-phosphate-potash formulation)

2/ Analyzing 16-48-0 (nitrogen-phosphate-potash formulation)

[441]

Procurement 29849-N (April 20, 1964)

Bids solicited for approximately 114,000 M/T of DAP

(Fund controlling quantity)

Total Awards: 111,600 M/T

Supplier	Port	Date of Shipment	Metric Tons Offered	FOB Price (M/T)	Award M/T
CPEA	Tampa	July/Aug.	63,620	86.95	49,000
Armour*	Mobile	Aug.	10,000	85.38	
Swift*	New Orleans	July/Aug.	1,000	83.20	1,000
Swift*	New Orleans	July/Aug.	1,000	83.48	1,000
Amer. Ag. & Chem.*	Tampa	July/Aug.	3,000	81.41	3,000
Armour*	Mobile	July/Aug.	10,000	85.22	
Armour*	Mobile	July/Aug.	3,000	99.81	
Amer. Ag. & Chem.*	Tampa	July/Aug.	3,000	81.32	3,000
Swift*	New Orleans	July/Aug.	2,000	84.09	2,000
Smith-Douglass	Tampa	Aug.	3,600	84.00	3,600
Smith-Douglass	Tampa	Aug.	1,400	85.50	
Fert. del Istmo*	Mexico	Aug.	2,500	104.88	
Swift*	New Orleans	Aug.	1,000	83.47	1,000
Swift*	New Orleans	Aug.	1,000	84.47	
Armour*	Mobile	Aug.	2,500	85.33	
Armour*	Mobile	Aug.	2,500	85.39	
Armour*	Mobile	Aug.	2,500	85.45	
Armour*	Mobile	Aug.	2,500	85.51	
Fert. del Istmo*	Mexico	Aug.	2,500	106.59	
Armour*	Mobile	Aug.	10,000	88.22	
Swift*	New Orleans	Aug.	1,000	86.37	1,000
Swift*	New Orleans	Aug.	1,000	84.79	1,000
Olin-Mathieson	Pasadena, Texas	July	1,000	91.25	
CPEA	Tampa	June	46,000	86.95	43,000
Fert. del Istmo*	Mexico	June	1,500	104.88	
Fert. del Istmo*	Mexico	June	1,500	106.59	
Amer. Ag. & Chem.*	Tampa	June	3,000	83.17	3,000

*Supplier not a bidder. Listed prices and quantities were computed and bid by various U. S. and foreign brokers.

[442] Procurement 4050-N (August, 1964)

Bids solicited for approximately 170,000 M/T of TSP

(Fund controlling quantity)

Total Awards: 148,500 M/T

Supplier	Port	Date of Shipment	Metric Tons** Offered	FOB Price (M/T)	Award M/T
Not specified*	New York	Jan./Feb.	5,000	50.54	
Swift & Co.*	Tampa	Feb.	1,000	52.45	1,000
Swift & Co.*	"	Dec.	2,000	53.48	2,000
Swift & Co.*	"	Jan.	2,000	53.48	2,000
Swift & Co.*	"	Sep./Oct.	5,000	53.52	5,000
Swift & Co.*	"	Dec.	1,000	53.53	1,000
Swift & Co.*	"	Feb.	1,000	53.58	1,000
CPEA	"	Sep./Feb.	130,000	53.96	136,500
Swift & Co.*	"	Nov.	2,000	54.95	
Swift & Co.*	"	Nov.	1,000	55.07	
Armour*	"	Oct./Nov.	10,000	56.94	
Smith-Douglass*	"	Nov./Dec.	2,500	57.15	
Smith-Douglass*	"	Sep./Feb.	2,500	57.32	
Smith-Douglass*	"	Sep./Feb.	2,500	57.45	
Armour*	"	Jan./Feb.	10,000	57.94	
American Agri. Chem.*	"	Sep./Feb.	1,000	58.35	
Guanos y. Fert. de Mexico, S.A.*	Coatzacoalcos, Mexico	Sep./Oct.	20,000	59.75	
SIAPE*	Sfax, Tunisia	Jan.	5,000	60.00	
NPK Engrais*	"	Feb.	10,000	60.03	
SIAPE*	"	Feb.	10,000	60.05	
NPK Engrais*	"	Jan.	5,000	60.08	
SIAPE*	"	Feb.	5,000	60.10	
NPK Engrais*	"	Feb.	5,000	60.15	

*Supplier not a bidder. Listed prices and quantities were computed and bid by various U. S. and foreign brokers.

**5% more or less, at buyer's option.

[443]

Procurement 4050-N (Re-tender) (October, 1964)

Bids solicited for approximately 10,000 M/T of TSP

(Fund controlling quantity)

Total Awards: 69,000 M/T

Supplier	Port	Date of Shipment	Metric Tons Offered	FOB Price (M/T)	Award M/T
CPEA	Tampa	Feb.	10,000 1/	53.35	
CPEA	Tampa	Feb.	10,000	56.51	10,000
Armour*	Tampa	Nov./Dec.	10,000	57.94	10,000
Armour*	Tampa	Jan./Feb.	10,000	57.94	9,400
Armour*	Tampa	Nov./Dec.	5,000	58.50	
SIAPE*	Sfax, Tunisia	Feb.	10,000	60.30	10,000
NPK Engrais*	Sfax, Tunisia	Jan.	10,000	60.35	10,000
SIAPE*	Sfax, Tunisia	Feb.	10,000	60.40	10,000
NPK Engrais*	Sfax, Tunisia	Feb.	10,000	60.45	9,600

*Supplier not a bidder. Listed prices and quantities were computed and bid by various U. S. and foreign brokers.

1/ Standard TSP (Not granular)

[444] Procurement No. 5009-N (April, 1965)

Bids solicited for DAP

(Fund controlling quantity)

Total Awards: 30,290 M/T

Supplier	Port	Date of Shipment	Metric Tons Offered	FOB Price (M/T)	Award M/T
National Phosphate*	Hahnville, La.	June/July	5,000	78.64	
" "	"	June/July	5,000	78.64	
" "	"	June/July	10,000 alternate	78.64	10,290
" "	"	May/June	5,000	78.64	5,000
" "	"	June	5,000	78.64	5,000
" "	"	July	5,000	78.64	5,000
" "	"	July	5,000	78.64	5,000
" "	"	June	10,000 alternate	78.64	
" "	"	July	10,000 alternate	78.64	
CPEA	Tampa	June/July	25,000	84.74	
Olin-Mathieson*	Tampa	June/July	1,000	87.00	
Smith-Douglass*	Tampa	July	4,000	87.36	
Swift & Co.*	Tampa	July	1,000	87.86	
Monsanto*	New Orleans	Aug./Sep.	20,000	88.56	
Olin-Mathieson*	Houston	July	5,000	86.70	
Monsanto*	Long Beach	Aug./Sep.	500	127.86	

*Supplier not a bidder. Listed prices and quantities were computed and bid by various U. S. and foreign brokers.

[445] Procurement 5066-N (July, 1965)

Bids solicited for approximately 150,000 M/T of TSP

(Fund controlling quantity)

Total Awards: 206,800 M/T

Supplier	Port	Date of Shipment	Metric Tons Offered	FOB Price (M/T)	Award M/T
Swift & Co.*	Tampa	Sep.	6,000	55.82	6,300
Swift & Co.*	"	Aug.	6,000	56.65	6,000
Swift & Co.*	"	Oct.	6,000	56.67	6,300
Swift & Co.*	"	Nov./Jan.	4,000	57.24	4,200
CPEA	"	Aug./Feb.	153,000	57.80	153,200
Swift & Co.*	"	Dec./Feb.	4,000	57.98	
Swift & Co.*	"	Nov.	4,000	58.20	
Armour*	"	Aug./Feb.	4,000	58.28	
First Mississippi Corp.*	Port Sutton, Fla.	Aug./Sep.	10,000	58.70	
National Phosphate*	Tampa	Aug./Sep.	8,500	59.41	
National Phosphate*	"	Aug./Sep.	8,500	59.62	
National Phosphate*	"	Aug./Sep.	8,500	59.89	
Maroc Chimie*	Safi, Morocco	Nov.	10,000	60.00	10,500
First Mississippi Corp.*	Port Sutton, Fla.	Oct./Dec.	10,000	60.35	
Maroc Chimie*	Safi, Morocco	Dec.	10,000	60.50	10,000
Maroc Chimie*	Safi, Morocco	Jan.	10,000	60.75	
SIAPE*	Sfax, Tunisia	Dec.	10,000	61.00	10,300
National Phosphate*	Tampa	Oct./Dec.	6,500	61.19	
National Phosphate*	Tampa	Oct./Dec.	6,500	61.25	
SIAPE*	Sfax, Tunisia	Jan.	10,000	61.50	
National Phosphate*	Tampa	Oct./Dec.	6,500	61.52	
SIAPE*	Sfax, Tunisia	Feb.	10,000	62.00	
NPK Engrais*	Sfax, Tunisia	Jan./Feb.	10,000	63.00	
Not specified*	Tampa	Oct./Feb.	30,000	63.44	
Companhia Uniao Fabril*	Setubal, Portugal	Dec.	10,000	64.35	

*Supplier not a bidder. Listed prices and quantities were computed and bid by various U. S. and foreign brokers.

[446] Procurement 5094-N (September, 1965)

Bids solicited for approximately 35,000 M/T of TSP

(Fund controlling quantity)

Total Awards: 47,590 M/T

Supplier	Port	Date of Shipment	Metric Tons Offered	FOB Price (M/T)	Award M/T
Armour Agri. Chem. Co.*	Tampa	Sep./Jan.	4,000	57.55	4,200
Swift & Co.*	Tampa	Dec.	5,000	58.22	5,250
Chevron Chem. Co.*	"	May/June	10,000	58.78	
Columbia Nitrogen Corp.*	"	June	10,000	58.78	
First Mississippi Corp.*	Port Sutton, Florida	Sep./Dec.	10,000	59.36	7,940
Maroc Chimie*	Safi, Morocco	Sep./Oct. 15	10,000	59.50	10,000
Maroc Chimie*	"	Sep./Oct. 31	10,000	59.50	10,200
Maroc Chimie*	"	Dec./Jan. 15	10,000	59.50	10,000
Maroc Chimie*	"	Dec./Jan. 31	10,000	59.50	
SIAPE*	Sfax, Tunisia	Jan.	10,000	61.00	
National Phosphate*	Tampa	Nov.	2,000	61.63	
"	"	Nov.	2,000	61.79	
"	"	Nov.	2,000	61.82	
"	"	Nov.	2,000	62.82	
"	"	Nov.	2,000	62.86	
"	"	Jan.	2,000	63.25	
"	"	Jan.	2,000	63.41	
"	"	Jan.	2,000	63.44	
"	"	Jan.	2,000	63.44	
Not specified	"	Oct./Jan.	37,000	63.44	
National Phosphate*	"	Jan.	2,000	63.71	
NPK Engrais*	Sfax, Tunisia	Jan./Feb.	10,000	64.00	
Companhia Uniao Fabril*	Setubal, Portugal	Dec.	10,000	64.35	

*Supplier not a bidder. Listed prices and quantities were computed and bid by various U. S. and foreign brokers.

[447] Procurement 6011-N (April, 1966)

Bids solicited for approximately 90,000 M/T of TSP

(Fund controlling quantity)

Total Awards: 138,400 M/T

Supplier	Port	Date of Shipment	Metric Tons Offered	FOB Price (M/T)	Award M/T
Occidental*	Jacksonville	Oct./Feb.	40,000	57.99	42,000
Occidental*	Tampa	June/July	15,000	57.99	16,000
Chevron*	"	June/Aug.	10,000	58.85	10,500
Swift*	"	July	5,000	58.92	5,250
Swift*	"	Oct.	5,000	59.10	5,000
Columbia Nitrogen*	"	June/July	10,000	59.12	10,500
Swift*	"	July/Nov.	10,000	59.32	5,250
Columbia Nitrogen*	"	June/July	10,000	59.44	3,900
CPEA	"	June/Aug.	115,000	59.47	
Maroc Chimie*	Morocco	June/July	14,000	59.50	40,000
Maroc Chimie*	"	June	14,000	59.50	
Maroc Chimie*	"	July	14,000	59.58	
Maroc Chimie*	"	July	14,000	59.50	
Swift*	Tampa	Nov.	5,000	59.71	
Swift*	"	Dec.	5,000	60.10	
Chevron*	"	Sep./Nov.	10,000	60.80	
Maroc Chimie*	Morocco	Oct.	14,000	61.00	
Maroc Chimie*	"	Jan.	14,000	61.00	
CPEA	Tampa	Sep./Nov.	115,000	61.47	
CPEA	"	May	10,000	61.47	
First Mississippi*	"	Nov.	10,000	61.77	
Wilson & Toomer*	Jacksonville	June/July	5,000	61.92	
N.P.K. Engrais*	Tunisia	May/June	10,000	62.00	
National Phos.	Tampa	May/Dec.	65,000	62.15	
Southern Nitrogen*	"	June/July	10,000	62.84	
CPEA	"	Dec./Feb.	115,000	63.49	
Royster*	"	July/Feb.	10,000	63.90	
Armour*	"	July	10,000	65.40	
Armour*	"	Nov.	10,000	65.76	
Armour*	"	Dec./Jan.	10,000	65.77	
Columbia Nitrogen*	"	Oct.	10,000	66.00	
Southern Nitrogen*	"	July	5,000	66.15	

*Supplier not a bidder. Listed prices and quantities were computed and bid by various U. S. and foreign brokers.

[Tr. 1] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

64 Civil 3914

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., AMERICAN CYANAMID COMPANY, W. R. GRACE & CO., INTERNATIONAL MINERALS & CHEMICAL CORPORATION, TENNESSEE CORPORATION and SOCONY MOBIL OIL COMPANY, INC., Defendants.

Before: Hon. SYLVESTER J. RYAN, District Judge.

New York, March 20, 1967; 11.00 o'clock a.m.

Appearances:

Burton R. Thorman, E. Leo Backus, Larry D. Knippa, Robert K. Johnson, Attorneys, Antitrust Division, Department of Justice, For the Plaintiff.

[Tr. 2-15] Hollabaugh & Jacobs, Marcus A. Hollabaugh, Alan S. Ward, Attorneys for Defendant, The Concentrated Phosphate Export Association, Inc.

Donovan Leisure Newton & Irvine, Samuel W. Murphy, Jr., Andrew J. Kilcarr, Vernon E. Vig, Attorneys for Defendant, American Cyanamid Company.

Cahill, Gordon, Sonnett, Reindel & Ohl, Douglas E. Cutler, Peter H. Schuck, Attorneys for Defendant, W. R. Grace & Co.

White & Case, Edgar E. Barton, Abdul W. Wohabe, Attorneys for Defendant, International Minerals & Chemical Corporation.

Guggenheimer & Untermyer, Randolph Guggenheimer, Leon H. Tykulsker, Randolph Guggenheimer, Jr., Attorneys for Defendant, Tennessee Corporation.

Howrey, Simon, Baker & Murchison, Edward F. Howrey, John Bodner, Jr., Attorneys for Defendant, Socony Mobil Oil Corporation.

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[Tr. 16] The Court: Did the agreement that these people made as members of this Association apply to sales to other countries or other users or purchasers in other countries, or was this an agreement amongst these people which dealt solely with the foreign aid program?

Mr. Thorman: No. Their agreement was broader. It covered any transactions in the export field.

The Court: All right. So that they did not single out the United States for treatment alone and they did not single out the foreign aid purchasers of the United States for specialized treatment, is that correct?

Mr. Thorman: That is correct. One observation I might [Tr. 17] make which might be pertinent is that in their initial membership agreements they did limit their activities to the eastern hemisphere. In a subsequent amendment, I think in 1963, they took off this restriction so that they could sell worldwide, but in neither event did it limit itself in terms of foreign aid.

* * * * *

The Court: Was the price charged to the United States on these foreign aid program sales by the members of this Association out of line with the price they charged [Tr. 18-19] other people for sales around the same territory?

Mr. Thorman: We make no allegation that it was, your Honor.

The Court: So I can assume, then, that the Association applied a uniform pricing policy on export sales throughout the entire eastern hemisphere and subsequently changed it to apply throughout the entire world on foreign shipments.

Mr. Thorman: Well, policy, yes. Whether the price was identical, I am not in a position to say.

The Court. There had to be a variation in price, depending upon ——

Mr. Thorman: I think it depended on each transaction.

The Court: I mean, outside of fair adjustments for the mode of shipment and the distance, there was no arbitrary distinction where they sought to levy an additional or

higher price on the foreign aid purchases of the Government than were charged other foreign purchasers.

Mr. Thorman: No. That's correct, your Honor.

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[Tr. 20-31] The Court: Is there any contention here that these were not reasonable prices, in view of your concession and statement that they were identical and were uniform with the prices charged other foreign purchasers?

Mr. Thorman: No, there is no contention on that • • •

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[Tr. 32] "The Court: No charge is made, is it, by the Government that there was a price charged by the members of the Association which was entirely out of proportion or not consonant with the prices charged by the independent [Tr. 33-43] suppliers, be they domestic or foreign?")

The Court: Would you answer that question?

Mr. Thorman: No, no charge is made of that.

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[Tr. 44] Mr. Thorman: Exhibit 24 is on page 264. That is the notice of award given to the Association by the Office of Supply, Government of Korea, awarding them 176,000 metric tons.

The Court: Of course, when this came in, the Korean Government might not have attached any significance to the title Concentrated Phosphate Export Association, Inc., but the foreign aid program officer certainly knew that that was an Association designed to take the benefits and the privileges of the Webb-Pomerene Act, didn't he?

Mr. Thorman: Yes, that is correct.

The Court: So they dealt with these people knowing that they were operating, or claiming a right to operate, under the protection of that Act.

Mr. Thorman: That is correct, your Honor.

[Tr. 45-46] The Court: And while, of course, there can be no waiver of the Government's, I mean this wasn't a fraud that was perpetrated on the Government.

Mr. Thorman: No, your Honor. There is no allegation of fraud in this case.

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[Tr. 47] The Court: What we are involved with here in this case, as I take it, is an equitable suit to obtain injunctive relief for violation of the anti-trust law, and that alone.

Mr. Thorman: That is correct, your Honor.

The Court: Has the Government also filed another suit [Tr. 48-52] to recover part of the purchase price as being moneys paid under a false certification?

Mr. Thorman: No, your Honor.

The Court: Or has the Government filed another suit to recover part of the purchase price for violation of this Regulation 1, charging it is a breach of the contract of sale?

Mr. Thorman: No, your Honor, there is no charge of that nature.

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[Tr. 53] The Court: Am I right in my impression that there was no attempt made by these defendants to conceal the fact that they were operating in concert, together, on these shipments and through their Association?

Mr. Thorman: That is correct.

The Court: And this is not a case where each one of these suppliers independently submitted a bid and the others either abstained from bidding or put in a bid entirely out of proportion so that they wouldn't be awarded the bid; this was done openly by these defendants, with no attempt on their part to conceal the fact that they were acting in concert?

Mr. Thorman: Your Honor's statement is correct.

[Tr. 54-72] The Court: All right. Apparently, if there has been any violation of law, it hasn't been a wilful violation by them. Of course, that wouldn't make much difference except by way of the provisions which might be contained in the decree which would follow a judgment adverse to them. But there is no veniality; they apparently felt they were doing what they had a lawful right to do.

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[Tr. 73-79] Mr. Thorman: But the question arose as the frequency of these transactions increased and the AID

people became concerned over whether this was proper, whether they were carrying out their duties, and it was for this reason that the matter was brought to the Department and eventually it was decided, because there was a question of law involved here and question of interpretation, that we should come to the Court asking not for punishment but for prospective relief, that the Court adjudicate this legal question.

* * * * * *

[Tr. 80] The Court: But we are talking about this being a case of novel impression, and I did make the observation that everybody knew what was being done, there was no effort at concealment, no fraud was perpetrated, and from the very nature of the contracts themselves and the name of this association everybody in the government knew what this association was created for and why it existed.

And it would seem to me that where you have a statute interpreted in such a way over such a long period of time, 40 years at least, to throw that interpretation out without a legislative amendment or legislative change just seems to be unsettling of what little there is established within our government. I mean, you have to have some standards. If they have been long accepted and long applied by the government, the businessman has to know that he can do business with a certain amount of reliance [Tr. 81-110] upon that. That is necessary for the conduct of daily business.

Mr. Thorman: I submit, your Honor, that this is the very reason why this case was brought, so that we would get this type of interpretation. We are not asking any punitive action against the defendants. We are asking merely for prospective relief, that this Court adjudicate the legal question.

I think we originally had thought that there ought to be dissolution of the Association. We subsequently changed that and have abandoned that in our brief.

The important point we think here is to get an adjudication so that both the defendants and those similarly situated to them, as well as the government, knows which way this should go.

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UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

64 Civ. 3914

UNITED STATES OF AMERICA, Plaintiff,

v.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., AMERICAN CYANAMID COMPANY, W. R. GRACE & CO., INTERNATIONAL MINERALS & CHEMICAL CORPORATION, TENNESSEE CORPORATION and SOCONY MOBIL OIL COMPANY, INC., Defendants.

OPINION

RYAN, J.:

This is an action brought to enjoin the price-fixing and business allocation activities of five fertilizer producers in connection with sales of fertilizer, made under the United States Foreign Aid Program, which was destined for the Republic of Korea. The challenged activities were conducted through the defendant Concentrated Phosphate Export Association, Inc. (CPEA), organized by the other defendants, or their respective corporate predecessors, in 1961. All facts have been stipulated. The question of law presented is whether the exemption from the Sherman Act provided for in the Webb-Pomerene Act applies to these transactions.[1]

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[1] Section 1 of the Sherman Act, as amended, 26 Stat. 209, 15 U.S.C. 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *.

Section 1 of the Webb-Pomerene Act, 40 Stat. 516, 15 U.S.C. 61, provides in pertinent part:

> The words "export trade" * * * mean solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but the words "export trade" shall not be deemed to include

The parties have stipulated as follows:

> The issue presented by the pleadings in this case is whether the Concentrated Phosphate Export Association, Inc., a non-profit membership corporation organized and operated under the Act of April 10, 1918, Ch. 50, 40 Stat. 516, 15 U.S.C. 61-65 (commonly known as the Webb-Pomerene Act), and its members violated Section 1 of the Sherman Act (15 U.S.C. 1) in connection with that portion of the Association's sales of phosphatic fertilizer which such Association made for shipment to the Republic of Korea, where the Board of five Directors of the Association composed of one Director for each member agreed on selling prices and on allocation of sales among such Members, when United States Government foreign aid funds were made available to pay for said phosphatic fertilizer shipments in accord-

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> the production, manufacture or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale.

Section 2 of the Webb-Pomerene Act, 40 Stat. 517 (1918), 15 U.S.C. 62, provides:

> That nothing contained in (the Sherman Act) shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States and is not in restraint of the export trade of any domestic competitor of such association: And provided further, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.

ance with statutes, treaties and regulations applicable to the U.S. foreign aid program.

Plaintiff, conceding that the transactions involved were exports from Florida to the Republic of Korea, contends that because they were part of a United States program of foreign aid, controlled, managed and funded by the Government, they are not "export trade" within the meaning of the "Webb-Pomerene Act" and consequently were in violation of the anti-trust laws. The defendants rest squarely on the Act and answer that since these transactions were literally exports, the fact that they were shipped under the foreign aid program cannot convert them into domestic sales excluded from the statutory immunity. Plaintiff does not otherwise dispute the lawfulness of CPEA's operations under the Webb-Pomerene Act and the only question, therefore, is the application of the Act to these sales.

Plaintiff's reasoning is that the sales in question do not come within the Webb-Pomerene Act because they do not constitute export trade in that they were such an integral part of a United States program which paid for and closely controlled them, that they were tantamount to purchases made by the United States for the benefit of the Republic of Korea and are therefore domestic sales. Plaintiff also urges that, even if these transactions be held to be export trade, they were never within the contemplation of Congress when it legislated the immunity because (a) there was at that time no Foreign Aid Program in which the Government assumed the financial burden and cost for these commodities sold; (b) the price-fixing activities of the defendants injured the United States. The Government also urges that there is no necessity for these defendants to have the benefit of the immunity of the Act for they were not required to meet unlimited competition from suppliers abroad in foreign aid sales. Finally, the Government contends that a contrary interpretation of the immunity of the Webb-Pomerene Act would destroy the purpose of the exemption and frustrate the foreign aid program as well as the Sherman Act.

Summed up, the Government's argument is one a posteriori: from the conclusion that price fixing is per se illegal under antitrust principles in that injury to competition and

to the public is presumed, it takes but one step back to conclude that ergo the United States and its citizens, who bore the cost initially of these fixed prices, must have been hurt. The Government reasoning that this was not intended by Congress when it immunized certain sales reaches a conclusion that these sales do not come within the exemptions of the Webb-Pomerene Act, that they are in violation of antitrust law, and, being "illegal per se", are to be struck down.

We have concluded that the answer lies in the wording of the statute. Let us, first, summarize the facts necessary to an appreciation of the question presented.

There is no dispute as to the accuracy of facts advanced by either party in support of its position. They do differ as to relevance and materiality of some of these facts and, of course, as to the conclusions to be drawn from them. The cooperation of counsel at pretrial hearings produced a statement of stipulated facts with exhibits attached; we turn to these:

The defendants are:

CPEA—a non-profit Delaware corporation with its principal place of business in New York, New York, organized on September 12, 1961 to engage solely in export trade as the term "export trade" is defined in the Webb-Pomerene Act, and specifically to engage in trade and commerce in the product known as triple superphosphate and certain other concentrated phosphatic materials. (At all material times, CPEA has been duly registered with the Federal Trade Commission as an association organized and acting under the Webb-Pomerene Act.)

CPEA's five Members: W. R. Grace & Co.; Tennessee Corporation; Socony Mobil Company, Inc.; American Cyanamid Company and International Minerals and Chemical Corporation.[2]

Each of these defendant members is a domestic corporation producing chemical fertilizers known as "concentrated phosphates".

CPEA acts as an export selling agency for the concentrated phosphate products of its members. These products

[2] International Minerals and Chemical Corp. withdrew its membership on June 30, 1966.

are shipped from Florida to Korea and other foreign ports. CPEA handles all phases of developing and negotiation of these sales and this includes all details, such as the submission of bids, shipment, transportation and billing. The management of CPEA is provided for in its bylaws. It is vested in a Board of Directors equal in number to the number of members with each member entitled to nominate one director. CPEA at all times since its formation has been governed by the Board of Directors, each director representing one of its members. The Board of Directors established the minimum price at which materials would be sold by CPEA and the price at which the member would sell to the Association. The Board of Directors also allocated the available business among the members in accordance with the procedures set forth in the Membership Agreements.[3] None of the members bid as individuals on the Korean foreign aid procurements here in suit, all such sales were handled by CPEA.

The Government does not challenge the lawfulness of defendants' operations under the Act except as specifically stated in the issue stipulated. Thus, it does not charge that defendants have in any way restrained the domestic export trade of a competitor or enhanced or depressed prices within the United States—activities which under the wording of the Act would deprive them of its immunity.

There were 13 shipments made from September 1961 (when CPEA was formed) through 1966, in which concentrated phosphates were procured "for shipment directly to and use by the Republic of Korea." This action is concerned with but 11 of these shipments. The materials procured and the costs of these shipments "were paid for with funds from the United States Government made available under its foreign assistance program to the Gov-

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[3] As required by the Act, copies of CPEA's corporate charter, by-laws and membership agreement were filed with the FTC. Annual reports for the years 1961-1965 were also so filed, as well as special reports of annual sales volumes. In 1964, at the Commission's request, CPEA submitted a report separately stating the dollar volume of CPEA's 1961-1962 sales believed to have been subject to AID financing.

ernment of Korea", administered by AID,[4] or its predecessor ICA.[5]

One of the other two shipments was financed with Korean Foreign Exchange Funds, and the other shipment was financed out of a special Stabilization Fund granted in 1961 by the United States to the Republic of Korea to meet Korea's need for foreign exchange and to offset the anticipated short-term reduction in Korea's dollar earnings resulting from Korea's major reform in 1961 of its monetary exchange system. Neither of the two shipments was made subject to ICA or AID regulations; both were handled in accordance with OSROK's[6] applicable procurement procedures. Although payment for this last mentioned shipment was made with United States funds the Government does not challenge the lawfulness of this transaction.

The authority for the foreign assistance program since 1961 is contained in the Act for International Development of 1961 (AID) (22 USC 2151, 75 Stat. 424, 427), which provides authority to the President "to furnish assistance on such terms and conditions as he may determine in order to promote the economic development of less developed friendly countries and areas, with emphasis upon assisting the development of human resources through such means as programs of technical cooperation and development." (Sec. 211)

Among the terms and conditions, which must be met before eligibility for foreign aid is determined, is that the President find that the assistance proposed would not have a substantially adverse effect on the United States economy.

Following World War II, the United States Government made funds available to many countries to pay for commodities, including fertilizer, sold by commercial companies and shipped from the United States and other free-world sources to the recipient countries. Foreign aid funds have

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[4] "AID"—Agency for International Development, an agency of the United States Department of State, established in 1961.

[5] "ICA"—International Cooperation Administration, the predecessor agency of AID.

[6] "OSROK"—Office of Supply, Republic of Korea, the Korean governmental agency responsible for procurement of commodities for the Government of Korea.

been made available from time to time both prior to and after 1961 to pay for various commodities such as fertilizer including concentrated phosphates for the Republic of Korea through Acts of Congress beginning with the Mutual Security Act of 1954.[7]

This assistance is made available to Korea through various treaties and agreements. The relevant agreement here is "The Economic Technical and Related Assistance Agreement between the United States and the Republic of Korea of February 8, 1961". Concern for the economic and general welfare of the United States in the furnishing of this foreign aid is reflected in this Agreement for it is provided that the assistance to be given shall be subject to applicable United States laws and regulations. It is also provided that the Korean Government is to cooperate with the United States Government to assure that procurement will be at reasonable prices and on reasonable terms. It is further provided that

> All or any part of the program of assistance provided hereunder may be terminated by the Government of the United States if it determines that because of changed conditions the continuation of such assistance is unnecessary or undesirable.

The Foreign Aid program was supported by funds appropriated annually by Congress on budget requests and recommendations of the State Department and AID, stating the basis of detailed proposals which were made following negotiations with foreign countries seeking assistance. The funds appropriated by Congress were made available by AID in the form of loans or grants in accordance with the applicable statutes, agreements, and regulations. Foreign aid funds have not been used to procure commodities for use for resale in the United States.

The expenditure of funds AID allocated for Korean com-

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[7] Although plaintiff disputes their similarity, defendants say that foreign aid programs go back at least to 1948 and the Marshall Plan and even farther to the time the Webb-Pomerene Act was enacted, when Congress also enacted the Organization of American Relief in Europe in 1918. The significance of this will appear later.

modity imports was subject to AID's approval of "Procurement Authorization Applications", submitted by agencies of the Korean Government to AID from time to time. AID's approval of Korean fertilizer procurements was made either in the form of a "Procurement Authorization" issued to OSROK or a "Procurement Authorization, U.S. Government Agency Purchase Requisition" issued to GSA.

AID, which was officially characterized as essentially a financing institution, did not itself procure any concentrated phosphates for Korea.

The Government of Korea had no obligation to repay the amounts granted by the United States, but the concentrated phosphates procured with AID financing were sold to Korean consumers by a Korean Government agency and the Korean currency (hwan) received from such sales was deposited by the selling agency in an account at the Bank of Korea in accordance with agreements between the United States and Korean governments. The Korean currency generated by such sales was not necessarily equal to the United States dollar value of the fertilizer sold. Such deposits were called "counterpart funds" and were used to support, in part, Korean and United States military establishments in Korea and for other purposes mutually agreed upon by the governments of the United States and Korea, including financing public works projects of the Korean Government. These funds were also available to the United States "as requested" but the Korean Government could also draw against them. Agreement between the two countries as to the disposition of unencumbered balances was subject to approval of Congress.

It appears that of the 13 transactions in which Korea purchased concentrated phosphates for import and consumption, 11 were handled directly by OSROK issuing the invitation for bids and that the other 2 transactions were handled by General Services Administration (GSA). Where OSROK was the procuring agency, CPEA registered in Korea as a bidder as required by Korean regulations, and its bids were submitted there to OSROK and shipped on OSROK's call or requisition. OSROK, as buyer, handled the insurance; all disputes arising from the performance under the contract were adjusted and settled in Korea.

The following administrative procedure was taken where the procurement authorization issued to OSROK:

1. OSROK's submission to AID of a Procurement Authorization Application.
2. AID's issuance of a Procurement Authorization, a portion of which constituted a letter of commitment by AID to a specified United States Banking Institution to reimburse the bank for payment made to suppliers of the material being procured.
3. Invitation for Bids issued by OSROK requesting bids in compliance, inter alia, with AID Regulation No. 1.
4. AID's issuance of a Small Business Circular entitled "Trade Opportunities for American Suppliers", publishing the initiation for bid.
5. OSROK's Abstract of Bids received.
6. Lists of Successful Bidders prepared by OSROK and transmitted to AID.
7. Notice of Award issued by OSROK and in this instance addressed to CPEA.
8. Notice to supplier of Opening of Letter of Credit.
9. Letter of Credit with conditions issued to CPEA by J. Henry Schroder Banking Corporation, New York, hereinafter called "Schroder Bank".
10. A performance bond of the supplier.
11. Voucher of Schroder Bank to the United States Government claiming payment and stamped by the United States Treasury Department as "paid," and attached documents in support thereof, including the invoice of CPEA and its Supplier's Certificate.

OSROK described on its application the type and amount of fertilizer it required; the proposed area of source; the proposed basis and time of delivery; the United States Banking Institution; the estimate of cost; how it would ship the commodities f.o.b. on United States flagships; how it would evaluate the bids; the condition of the fertilizer (that it meet United States Federal Specification Inspection terms); and a detailed "End-use Justification" for such authorization.

Where GSA was the procuring agency, it issued "Invitations for Bids" on its standard form and its acceptance

of any bid was endorsed at the foot of the face [illegible] of the form in the name of the "United States of [illegible]rica by the Contracting Officer". Bids were invited to be submitted to GSA which indicated the recipient country, and code and delivery was specified as FAS or FOB vessel.

The bid tabulation of GSA shows that bids were received for delivery FOB vessel at Tampa, Florida, and for delivery FOB vessel in Tunisia and Portugal. Awards to successful bidders were made after review by GSA personnel. Invoices with supporting documents, including bills of lading, were submitted to GSA for payment. The shipper was designated as GSA with consignment to OSROK. Delivery by the supplier was established by a "Material Inspection and Receiving Report."

In short, GSA handled all incidents of the procurement from the invitation to bid to acceptance at the point of shipment, made shipment of the goods and made payment of the freight as well as payment of the purchase price.

The details of the control which the United States Government exerted over the Foreign Aid Program are spelled out in the Regulations adopted by AID for carrying out the program.

Upon the filing of a Procurment Authorization Application by the cooperating country to procure specified commodities against its allotment of AID funds, AID issued the Procurement Authorization after determination that the proposed purchase was in accordance with the objectives of the Act. The Procurement Authorization issued by AID either to OSROK or to GSA specified the commodity and the maximum amount of money which would be provided, the delivery periods, the source from which the commodity might be obtained, and other provisions deemed necessary by it.

Among the requirements imposed by Regulation 1 upon the cooperating country is that at least fifty percent of the gross tonnage of all commodities financed by AID transported by ocean vessels to the cooperating country must be carried in privately owned United States flag commercial vessels. Another is that where formal competitive bidding is used, as was done with all the relevant procurements, copies of the invitation for bids must be sent to the Office of Small Business, AID, to give United States sup-

pliers an opportunity to bid.[8] It also was further provided that if it appeared that "the objective of lowest competitive market price is not being met," AID would take appropriate action to impose additional limitations and might require a refund of the entire amount or as against the supplier of the amount by which the price exceeded the maximum price permitted by the regulation. Specific calculations were set forth for determining the permitted maximum price where there was no available competitive market. Even in instances of delivery FOB, AID reserved the right to divert the shipment at any time before delivery and to vest title in transit "if necessary to assure compliance with any Act of Congress."

As to the Supplier, Regulation 1 also required that, to obtain payment, the Supplier (here the defendants) had to complete an AID form called the Supplier's Certificate in which he acknowledged that the procurement was to be paid for from funds made available by the United States pursuant to AID Regulation 1. The Supplier agreed to make appropriate refund to AID upon demand, in the event of non-performance under his contract, for any breach of the certificate or for any false certification. The Supplier in addition certified that (1) the price did not exceed the market price; (2) that he had not given or received and would not give or receive any side payments or "kickbacks"; and (3) that he had not paid any contingent fees or commissions except as stated. This certificate, under "Notes", provides "(b) False statements herein are punishable by United States law." An important modification of the form certificate made in 1964, further provides that the agreement between the supplier and AID incorporated in the certificate shall be deemed to be a contract made under the laws of the District of Columbia. The 1964 revision requires too that the supplier maintain his records for a period of at least five years available for examination by AID.

As to the banks involved, Regulation 1 spelled out the responsibilities of the banking institutions. Generally, the bank is responsible for collection of the documents required,

[8] It is stipulated that in all 13 purchases CPEA directly competed for AID financed sales to Korea with domestic and eligible foreign producers of concentrated phosphates.

including the Supplier's Certificate, and for determining whether "in accordance with good commercial practice" the shipment complies with the requirements set forth in the letter of commitment as to delivery, source, destination, description and discounts or commissions. While the American bank operates under a letter of credit from the Bank of Korea, it looks not to the Bank of Korea but to the United States Government for payment, under the letter of commitment issued by AID to the bank set forth in AID's agreement to reimburse the bank for payments made against the account of the approved applicant which may be applicable to the procurement.

Adherence to these requirements was a condition imposed on suppliers by the Korean Government under OSROK's General Provisions for Bidding. These provisions limited the Korean Government's contractual liability to the supplier by conditioning its obligation on the receipt by the latter of the pertinent letter of commitment from AID.

The control of the United States over the OSROK's procurements is clearly defined. This control is even more evident in those instances where GSA was the procuring authority, for there, although Korea appeared as the "recipient country", the award was signed on behalf of the United States of America who, through GSA, made payment to the bank upon submission of invoices to it by the supplier. By agreement between GSA and AID's predecessor, ICA, AID provided GSA with funds to pay for the cost of commodities. Following ordinary usual Governmental bidding procedure, the bids were sent to Washington and one of the standard bidding provisions was that the contract would be awarded to the bidder whose bid was most "advantageous to the Government, price and other factors considered."

One cannot logically dispute plaintiff's conclusion that the GSA procurements represent the ultimate in control by the United States over the expenditure of foreign aid funds in the Korean fertilizer procurement and that they emphasize the close regulation and control provided for to insure the proper and judicious expenditure of United States funds under the foreign aid program.

We do question the Government's further statement that by reason of this control the real contracting party

for the commodities was the United States and that the transactions were therefore not "export trade", but domestic trade. We find to the contrary—the transactions were "export trade", especially in view of the concession by the Government that the goods sold by defendants were "for shipment to the Republic of Korea" procured by or on behalf of Korea by either OSROK or GSA acting as "the procurement agency" and that the commodities were used in Korea.

We also do not accept or agree with defendant's argument that AID was but an incidental party to the transaction—no more than the usual financing institution found in international transactions where there are problems of currency exchange. AID was at the center of the transaction: it was the force which initiated, directed, controlled and financed them. Without AID, there would have been no sale or purchase and the extent of the role it played was known in every detail to and relied on by both parties to the transaction, particularly by the supplier who looked to [AID] for payment and obligated itself to conform to its requirements and conditions if he was to receive payment. We find, however, that defendants were selling to the Korean Government. This we find, that the transaction was an "export" even where GSA was described in its procurement authorization and related documents as the "purchaser". The AID regulations referred to these transactions as "exports". It has been stipulated that AID did not purchase concentrated phosphates for consumption or resale. It is plain from the stipulated facts and from the very raison d'etre of the foreign aid program that the "cooperating country" and not the United States is the purchaser.

Plaintiff also stresses as an important factor that the Korean Government was under no obligation to repay these "grants" or "loans".[9] But we find this not to be the fact for, while Korea may not have signed a promissory note payable on demand in equivalent funds with interest, it did obligate itself to the extent that the Korean funds it received on re-sale of the commodities were to be de-

[9] Neither the tender nor award documents nor AID regulations make any distinction between the two forms of financing.

posited and used by it in accordance with its agreement with the United States and to be available to the Government of the United States in the manner required by it. This condition was hardly consistent with an outright gift of money to Korea. Indeed, the Government itself has pointed out that, despite the general statement of the purpose behind the Foreign Assistance Act, the Act makes it clear that Congress had no intention of writing a "blank check" for the underdeveloped countries to spend at will. AID Administrator David E. Bell, before the Senate Banking and Currency Committe (111 Cong. Rec. 5373 (1965)), testified:

> The foreign aid program provides goods and services to other countries which they cannot obtain through normal means—through their export earnings and through obtaining capital on commercial terms and by private investment. A successful aid program is one which enables the recipient country to strengthen its economy to the point where it can obtain goods and services it needs for steady expansion and growth by normal trade and normal capital movements—and without further need for aid grants and soft loans * * * It is plainly important to seek to carry out this important national program like any other, at minimum cost to the United States.

The commodity involved in these transactions was produced in the United States. It was loaded on ocean going vessels sailing from a United States port, with shipping documents naming the Korean Government as consumer and Korea as the destination. The risk of loss was not with the supplier for title passed from the supplier to OSROK (or the designee of ICA) and the Korean Government was named as shipper and consignee in the f.o.b. vessel bills of lading. The sales in question are clearly "export trade" and exempt from the antitrust laws unless it is provided to the contrary in the Webb-Pomerene Act.

This brings us to plaintiff's second argument, which is that, although the transactions may be literally export trade, in the context and against the background of the Act, they are not or cannot be the export trade intended by the Act, and that an examination of the legislative history of the Act demonstrates that it was not Congressional

intent to include this type of transaction within the statutory exemption, for the reason that it never contemplated this type of transaction where the United States Government was the financing party. The argument of the Government, attempting to divine a Congressional intent, continues that had Congress contemplated such foreign aid transactions would occur, it would not have exempted them.

In support of this ingenious argument, the Government puts emphasis upon the fact that Congress in the Act made it clear that the activities exempted were not "to operate to the prejudice of the American public" or "punish the people of the United States" and that, if that should be the result of the activities, they would not be immune. The Government further argues that the defendants frustrated the AID "objective of lowest competitive market prices" because, in aggregating the manufacturing and selling resources of five very substantial size companies, whose competitors, in most of the larger procurements herein, could furnish only a limited portion of the requirements, defendants eliminated much of the competition which would otherwise have existed. Having thus frustrated the objectives of the foreign aid program, the Government reasons defendants cannot now claim the immunity of the provisions of the Webb-Pomerene Act simply because of the format of their Association.

It may be that competition within the United States was curtailed among those five, although it has been stipulated that all CPEA-AID financed sales were obtained as a result of competitive bidding and that CPEA has faced world-wide competition for all sales from eligible sources. The argument concludes that, since Congress could not have intended to protect activities which injured the United States, the activities of the defendants are not protected and ergo come within the antitrust laws and are illegal under them.

Much as plaintiff strains at the meaning of the words "export trade", we are unable to find any ambiguity in them.

"To export" had at the time the Act was enacted the same meaning that it now has—"to carry or send abroad, especially to foreign countries." There is nothing to indicate that the Congress did not intend them to have this meaning; the Act itself refers to export as "goods exported

from the United States to any foreign nation."[10] On the face of the statute, the transactions were exempt from the antitrust laws.

Judicial construction should be used not to create doubt, but only to resolve one. Where there is no doubt, there is nothing to construe (*United States* v. *Rice*, 327 U.S. 742, 753; *Hamilton* v. *Rathbone*, 175 U.S. 414). We should not under the guise of "construction" rewrite the statute; obviously, this is not a judicial function. (*Palmer* v. *Massachusetts*, 308 U.S. 79, 83 (1939)).

The distinguishing feature, observes the Government, is that "In the context of the era and Congressional attitude, as reflected in the legislative history, 'export trade' has the common meaning of United States goods shipped to foreign nations and paid for by foreign buyers in a net transfer of wealth to this nation."

Accepting this definition, foreign aid financed trade is foreign trade, since there is a "net transfer of wealth to this nation", if not in dollars, certainly in its equivalence by the assurance of the economic and military stability of friendly nations. The return of wealth to this country may well be incalculable and far exceed measurement in dollar and cent standards.

But, in support of its position that Congress never envisaged immunizing transactions of this sort when the

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[10] The Act specically defines what is excluded from the words "export trade" by stating that they shall not be deemed to include the production, manufacture or selling for consumption or resale "within the United States" which it defines as trade "among the several states".

The United States Department of Commerce gives the official definition of exports as "the physical movement of merchandise out of the United States customs to foreign countries without regard to the method of financing." Census Bureau, Monthly Report of U.S. Exports Report F.T. 410.

In 1903, the Supreme Court defined the word "export" as used in the Constitution and the laws of the United States to mean the "transportation of goods from this to a foreign country." *Swan & Finch Co.* v. *United States*, 190 U.S. 143, 146.

United States was the one paying the fixed price, the Government points to the purpose of the Webb-Pomerene Act, which appears to have been to enable the domestic companies to compete with large foreign combines by permitting them to combine their capital and establish selling agencies to reduce their expenses of advertising and cultivating world trade as well as to affect the power of cartels. (H. R. Rep. #50, 65th Congr., 1st Sess. p. 2, 1917; 55th Cong. Rec. 3576 and 2785.)

Defendant say that it had another purpose—foreign aid, because at the time that Congress was making extremely large appropriations for foreign assistance and was authorizing the issuance of bonds to provide the funds for those appropriations under the form of "export credits" to be expended by the foreign countries for the purchase of American goods, there was no real prospect that these loans or credits would be repaid. Therefore, defendants urge that Congress did envisage the transactions in suit.

In further support of its argument, the Government contends that it is clear from the discussions leading up to the exclusions contained in the Act that the reason Congress immunized these trade export associations was that Congress was not overly concerned with what price was being exacted of a foreign purchaser, because there the American public was not bearing the financial brunt.

Herein is the core of the Government's argument; we cannot say that it does not have appeal. It seems obviously unfair to the United States, which paid these defendants, to permit the defendants to charge an artificially set price and deprive the Government of price benefits which might come from competitive trade conditions within the United States.

It is plain from the remarks of the proponents of the Act made in Congress when the Act was being considered that they were concerned that no injury befall to the domestic purchaser from this Act.

The remarks of Senator Pomerene were, in part, that:

> • • • although an association organized under the pending bill should enter into some agreement or perform some act in a foreign country which met the requirements of law there, if at the same time the effect

> of it were such as to materially interfere with the policy of the United States under its trust laws, then it would be subject to the jurisdiction of the authorities of this country, including both the Federal Trade Commission and the Department of Justice. (56 Cong. Rec. 170)

Congressman Webb stated:

> I would be willing that there should be a combination between anybody or anything for the purpose of capturing the trade of the world, if they do not punish the people of the United States in doing it. (55 Cong. Rec. 3580)

Another proponent of the bill said that its purpose was "to make that which is illegitimate relating to the people of the United States perfectly legitimate when relating to foreign peoples;" (55 Cong. Rec. 2788); and that it was not the duty of Congress to look after the interests of foreign nations.

The Report of the Senate Committee states:

> But while the purpose of these associations is to improve and extend our foreign trade, their business ought to be so conducted as to harmonize with the requirements of our laws respecting domestic trade and without injuring any domestic competitor in the foreign trade or unduly thereby enhancing prices to domestic consumers. (Sen. Rep. No. 109, 65th Congr., 1st Sess. p. 2 (1917).)

It was because Congress was concerned that the Act be not used to the detriment of domestic trade that it limited immunity to an association, agreement or act which was not in restraint of trade within the United States and not in restraint of the export trade of any domestic competitor of such association or which artificially, or intentionally, enhanced or depressed prices of lessened competition or restrained trade within the United States, none of which is charged here.

The Government's final argument is that the defendants' activities burdened and frustrated the Foreign Aid Pro-

gram because the burden of any price-fixing activities as to foreign aid procurements is borne directly by the American taxpayer, not by a foreign nation or consumer as in the ordinary export trade transaction. The added charge upon AID financed procurements, it urges, limited the attainment of the United States' foreign aid objectives.

It is undisputed, however, that officials of AID, OSROK and GSA were aware of CPEA's status as a "Webb" association; its membership was no secret to them; and they knew CPEA's material was being offered for sale in response to invitations to bid to supply phosphatic materials for shipment directly to Korea. Defendants, along with other "Webb" associations, were encouraged by the Government agencies to participate in these programs.[11] It is true that this was an entirely business-motivated participation of the "Webb" associations but that is not to say that all these associations fixed prices and allocated territories for there is no evidence one way or the other. We assume, however, if several competitors do join in such an association, they do so for their mutual benefit.

Factually, it does appear that the activities of CPEA were known for as required by the provisions of the Webb-Pomerene Act, a report of CPEA's formation was made to the Federal Trade Commission (FTC) on October 6, 1961; and copies of the corporate charter, by-laws and membership agreements were filed with that report. All amendments to the charter and the membership agreements were reported to the FTC. CPEA also filed with the FTC annual reports for the years 1961 through 1965 in accord with provisions of the Webb-Pomerene Act, and responded to FTC's requests for special reports of, among other things, annual sales volume. In 1964, CPEA submitted to

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[11] Webb associations other than CPEA have sold and are selling under the AID program and have sold under foreign aid programs administered by ICA. In addition, under different statutory and regulatory requirements, the U.S. Government has furnished funds to finance export sales of agricultural products by Webb associations under the Public Law 480 program administered by the United States Department of Agriculture. Webb associations sold, too, under the Lend Lease program at least from 1941.

the FTC, at the Commission's request, a report which separately stated the dollar volume of CPEA's 1961-1962 sales believed to have been subject to AID financing.

If these activities were found to have been harmful to the foreign aid program, AID was not without remedy or means to discourage and stop such activities. Regulation I provided that the price was not to exceed the market price prevailing in the United States, or a price to be determined if there was no available market, with the privilege on the part of AID to seek a refund of the entire amount or of the excess charge and to cancel the transaction. These were terms to which the suppliers agreed. AID, however, has taken no action in this respect; perhaps, it is because it has found that the price, although artificially fixed, is not unreasonable.

All that we have before us is a claim of violation of antitrust laws.

We conclude that there is no violation of antitrust laws because the activities of defendants were immunized by the Webb-Pomerene Act.[12]

Complaint is dismissed upon the merits and the Clerk of the Court is directed to enter judgment of dismissal in favor of the defendants. So ordered.

(S) Sylvester J. Ryan, U.S.D.J.

Dated: New York, New York, September 11, 1967.

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[12] Apparently the question of whether defendants who are selling in connection with foreign aid programs should enjoy such immunity is not novel. It appears that Congress has reviewed the Webb-Pomerene Act on a number of occasions over the years and, on such occasions, spokesmen for the Justice Department often have advocated its outright repeal. Congress, however, has thus far declined to either amend or repeal the statute.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

64 Civ. 3914

UNITED STATES OF AMERICA, Plaintiff,

v.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., AMERICAN CYANAMID COMPANY, W. R. GRACE & CO., INTERNATIONAL MINERALS & CHEMICAL CORPORATION, TENNESSEE CORPORATION and SOCONY MOBIL OIL COMPANY, INC., Defendants.

JUDGMENT

This cause having been brought on regularly for trial before the Honorable Sylvester J. Ryan, United States District Judge, non-jury, on March 20th, 1967, and the Court at the conclusion of trial having reserved its decision, and thereafter on September 11th, 1967, having filed its memorandum opinion dismissing the complaint on the merits and directing the Clerk to enter judgment of dismissal in favor of the defendants, it is

Ordered, adjudged and decreed: that the defendants The Concentrated Phosphate Export Association, Inc., American Cyanamid Company, W. R. Grace & Co., International Minerals & Chemical Corporation, Tennessee Corporation and Socony Mobil Oil Company, Inc., have judgment against the plaintiff UNITED STATES OF AMERICA dismissing the complaint.

John J. Olear, Jr., Clerk.

Dated: New York, N.Y., September 11th, 1967.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1967

No. 1102

UNITED STATES, Appellant,

v.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., et al.

Appeal from the United States District Court for the Southern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

April 1, 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968—290-864/799

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 402

UNITED STATES OF AMERICA, APPELLANT

v.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion and order of the district court dismissing the government's complaint on the merits (App., *infra*, pp. 19–44) is reported at 273 F. Supp. 263.

JURISDICTION

The order of the district court was entered on September 11, 1967. The United States filed its notice of appeal on November 9, 1967. By order of Mr. Justice Harlan, dated December 4, 1967, the time for docketing the appeal was extended to and including February 9, 1968. The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of Feb-

ruary 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *Brown Shoe Co.* v. *United States*, 370 U.S. 294; *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316.

QUESTION PRESENTED

Whether export trade associations engaged in selling goods procured under the government's foreign aid program are exempted from the antitrust laws by the Webb-Pomerene Act.

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *.

Section 1 of the Webb-Pomerene Act, 40 Stat. 516, 15 U.S.C. 61, provides in pertinent part:

> The words "export trade" * * * mean solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but the words "export trade" shall not be deemed to include the production, manufacture, or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale.

> The words "trade within the United States" wherever used in this Act mean trade or commerce among the several States or in any Territory of the United States, or in the District of Columbia, or between any such Territory and another; or between any such Territory or Territories and any State or States or the District of Columbia, or between the District of Columbia and any State or States.

Section 2 of the Webb-Pomerene Act, 15 U.S.C. 62, provides:

> Nothing contained in [the Sherman Act] shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: *And provided further,* that such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association or which substantially lessens competition within the United States or otherwise restrains trade therein.

STATEMENT

A. *Background.* In 1961 The Concentrated Phosphate Export Association ("the Association"), com-

posed of firms engaged in the domestic production of concentrated phosphatic materials, was incorporated for the purpose of enabling its members to act as a group in the overseas sale of phosphate used in the production of fertilizer.[1] It registered with the Federal Trade Commission as an "association which engages solely in export trade" under Section 5 of the Webb-Pomerene Act (40 Stat. 517, 15 U.S.C. 65). The Association allocates available business among its members, sets the price at which each may sell concentrated phosphate to the Association, and determines the minimum price at which these materials will be sold by the Association abroad (Stip. 11).[2]

On December 21, 1964, the United States filed a complaint against the Association and its member firms, charging that they had violated Section 1 of the Sherman Act in connection with the procurement of phosphatic materials for shipment to the Republic of Korea pursuant to the government's foreign aid program. The government sought an injunction against further concerted activity by the defendant firms in connection with foreign aid transactions; during the proceedings the government abandoned its additional request for dissolution of the Association.

[1] In 1961 the Association's membership consisted of W. R. Grace & Company, Tennessee Corporation, and American Cyanamid Company. Two other corporations which were members at the time this case originally went to trial later withdrew from the Association. International Minerals & Chemical Corporation terminated its membership on June 30, 1966. Socony Mobil Company, Inc., now known as Mobil Oil Co., withdrew from membership effective March 15, 1967. We are informed that the Association was dissolved on December 19, 1967.

[2] "Stip." refers to stipulated facts in the district court.

B. *The facts.* The stipulated facts showed that the Association furnished 822,000 tons of concentrated phosphate to the Korean Government in 13 transactions occurring between September 1961 and April 1966. Eleven of these transactions, the subject of the instant action, were arranged and financed by the Agency for International Development ("AID"), an agency of the United States Government which administers the foreign aid program. The Association received $48 million—52.5 percent of its overall income during the period—from these transactions. Its members did not bid individually on any of these sales; in each instance a single bid was agreed upon by all members and submitted on their behalf by the Association. On most of the sales, the Association was the only bidder capable of supplying the large quantities of concentrated phosphate required by Korea.

Once authorized, AID-financed procurement may be arranged by either of two methods. Under one, the General Services Administration ("GSA") issues and processes all bids in the United States and makes the award to the exporter whose bid is accepted; the exporter delivers to the United States which ships the goods abroad to the foreign recipient. Under the other method, the procurement authorization is issued by AID to the recipient government; that government issues invitations for bids, processes them, and makes the award to the accepted bidder, who then delivers the goods abroad at the designated foreign port. Funds to pay for such procurements are committed by AID at the time it issues the initial procurement authoriza-

tion, and the recipient government's obligation to the bidder is satisfied from such funds.[3] Under either method, the United States bears 100 percent of the cost of the exported items.

Of the eleven procurements involved here, nine were arranged through an agency of the Korean Government, in conjunction with AID, and the other two were handled by GSA.[4] Regardless of the method of procurement utilized, AID exercised complete control over the entire transaction. AID Regulation 1, 22 C.F.R. Part 201. AID's approval and issuance of a procurement authorization was necessary to initiate the process in each case. It maintained rigid control over the type of bids that could be approved and the manner of their submission. Moreover, AID retained throughout the right to cancel and divert shipments of the goods at any time before delivery "if * * * necessary to assure compliance with the provisions or purposes of any act of Congress" (22 C.F.R. 201.44).

C. *The district court's decision.* On September 11, 1967, the district court dismissed the complaint on the merits, holding that the Association's activities in

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[3] When the concentrated phosphate procured with AID funds is resold by the Korean Government to private purchasers within Korea, the funds generated thereby are deposited in the Bank of Korea and are subject to a "counterpart fund" arrangement (App., *infra*, pp. 27–28). Under this arrangement, these funds are available to both the United States and Korea to be used for mutually agreed purposes such as supporting American and Korean defense establishments, Korean public works programs, etc. (*ibid.*). However, Korea is under no formal obligation to repay the AID funds (Stip. 22; see App., *infra*, pp. 34–35).

[4] For a detailed description of the manner in which the two methods of procurement operated, see the discussion in the district court's opinion (App., *infra*, pp. 28–33).

connection with the sale of concentrated phosphate for shipment to Korea were exempted from the antitrust laws by the Webb-Pomerene Act. It agreed with the government that the United States, through AID, "initiated, directed, controlled and financed" the transactions (App., *infra*, p. 34). But it concluded that the sales, whether handled through an agency of the Korean government or through GSA, were actually made to the Korean government as purchaser. It based this on the fact that the commodity was specifically procured for Korea; on the "raison d'etre" of the foreign aid program; on the counterpart fund arrangement with Korea; and on the fact that after shipment the risk of loss is on Korea (App., *infra*, pp. 34–36). Since the procurements were not for domestic resale or consumption, and were made to a foreign purchaser, the court determined that they constituted "export trade" within the literal meaning of the Webb-Pomerene Act (App., *infra*, p. 36).

The district court rejected the government's argument that the Webb-Pomerene Act was not intended to apply to situations where the people of the United States are disadvantaged by the concerted activities. It conceded the unfairness of depriving the government, which pays for the shipments, and ultimately the American taxpayer, of the benefits of competitive bidding. But it found that there was no ambiguity in the statute's definition of "export trade." It noted that Congress had carefully limited the provisions of the Webb-Pomerene Act so as to prevent any injury to domestic competition and any effect on domestic prices, but pointed out that no such injury or effect

was charged in the instant case * (App., *infra*, 39–41). As to the government's claim that bidding by Webb-Pomerene associations burdens and frustrates the foreign aid program, the court held that the Association's status was fully known to AID when it accepted the bids, and that AID has ample regulatory power to protect its procurement activities from unreasonable prices. (App., *infra*, pp. 41–42).

THE QUESTION IS SUBSTANTIAL

The district court has erroneously decided an important question concerning the scope of the Webb-Pomerene exemption to the antitrust laws. The holding below that the exemption applies to sales made under the foreign aid program extends that statute beyond the limited reach it was intended to serve, is inconsistent with the congressional purpose in enacting the legislation, and burdens the American economy with non-competitive bidding in procurement for the foreign aid program.

The decision of the district court is erroneous in at least four respects. First, it mechanically applies the Webb-Pomerene exemption without recognition of the antitrust context in which the statute operates and in derogation of the accepted principle that exceptions to the antitrust laws are to be narrowly construed. Second, it disregards the narrow purposes of the Webb-Pomerene Act as disclosed by its legislative

* No allegation was made by the government that the Association's activities were "in restraint of the export trade of any domestic competitor of such association" or that its conduct "artifically or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association * * *" (15 U.S.C. 62) (see App., *infra*, p. 24).

history—to enable American exporters to cope with cartelized foreign competition in foreign markets without causing any adverse effects on the economy of the United States. Third, it treats the recipient country as the purchaser of the goods shipped even though, under the foreign aid program, the United States initiates, directs, controls and pays for the procurement. Finally, it assumes that AID's discretionary powers over procurement matters are a substitute for the role of the antitrust laws in guaranteeing competitive pricing in the foreign aid program.

1. The district court's broad treatment of the exemption created by the Webb-Pomerene Act fails to give full weight to the antitrust context in which the Act operates. Webb-Pomerene is an exception to the antitrust laws, and it is a familiar principle that such exceptions are narrowly construed, even where a literal reading of a statute might lead to a broader exemption. See *California* v. *Federal Power Comm'n*, 369 U.S. 482, 485; *Milk Producers Ass'n* v. *United States*, 362 U.S. 458, 469–470; cf. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 335–349. Accordingly, the language of the statute—particularly the central term "export trade"—must be confined to its specific underlying purpose.

2. The legislative history of the Webb-Pomerene Act indicates that the congressional purpose was narrow in scope. Congress passed the statute in order to enable American companies to compete effectively in international markets against foreign combines, and to offset the collective power of foreign purchasing cartels. The initial impetus for the legislation came from

a 1916 report of the Federal Trade Commission on cooperation in American export trade (see 55 Cong. Rec. 3576-3577). That report pointed to competitive disadvantages suffered by American exporters because our antitrust laws were thought to prevent them from undertaking joint selling arrangements in foreign markets.* But the Commission's report emphasized

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*Following the FTC's report in 1916, bills to implement its recommendations were introduced in Congress. H.R. 16707, 64th Cong., 1st Sess.; S. 6865, 64th Cong., 1st Sess.; H.R. 17350, 64th Cong., 1st and 2d Sess. After hearings (Hearings before the House Committee on the Judiciary on H.R. 17350, 64th Cong., 1st Sess.), H.R. 17350 was favorably reported in the House without amendment (H. Rep. No. 1118, 64th Cong., 1st Sess.). The debates in the House (53 Cong. Rec. 13532–13540, 13676–13732) were principally concerned with the necessity of protecting small American exporters from the concerted buying and selling power of foreign cartels. The expressed object of the bill was the promotion of export trade, and this view prevailed over the objections of those who feared the bill would effect a repeal of a significant portion of the Sherman Act. With certain amendments, the bill passed the House on September 2, 1916 (53 Cong. Rec. 13732).

After further hearings in the Senate (Hearings before the Senate Committee on Interstate Commerce on H.R. 17350, 64th Cong., 2d Sess.), the bill was favorably reported with amendments (S. Rep. No. 1056, 64th Cong., 2d Sess.), but was not acted upon in that chamber.

The bill passed by the House was reintroduced in the next Congress as H.R. 2316, 65th Cong., 1st Sess. After certain amendments in committee (H. Rep. No. 50, 65th Cong., 1st Sess.), it was passed by the House (55 Cong. Rec. 3584–3585), reported to the Senate with further amendments (S. Rep. No. 109, 65th Cong., 1st Sess.), and passed by that chamber (56 Cong. Rec. 186).

In conference, further provisions to make clear that competition in the domestic economy was not to be lessened in any way were added (see H. Conf. Rep. No. 468, 65th Cong., 2d Sess.). Both houses accepted the conference bill (56 Cong. Rec. 4698 (Senate), 56 Cong. Rec. 4722 (House)), and it was approved on April 10, 1918 (56 Cong. Rec. 4999).

that "[t]o allow American firms to cooperate for export and to permit the use of certain methods abroad which are legal in foreign countries, but are not permitted in the United States in no way implies that such cooperating firms will be allowed, through their activities in export trade, to bring about results in this country which could not otherwise be legally secured."[7] The same theme was reiterated by the legislation's sponsors (*e.g.*, 55 Cong. Rec. 3580, remarks of Congressman Webb; 56 Cong. Rec. 170, remarks of Senator Pomerene). The substance of the congressional debates was that export trade is a matter of competition between nations, and that Congress wished to put American exporters in a position to capture as much trade as possible for the United States at the expense of foreign nations, but without in any way burdening the people or the economy of this country.[8]

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[7] *Report of the Federal Trade Commission on Cooperation in American Export Trade*, p. 376 (1916). See H. Doc. No. 1485, 64th Cong., 2d Sess., pp. 19–22, 34–36.

[8] Indeed, in the 65th Congress the proposed legislation was criticized principally on three counts: (1) that it was contrary to the spirit of the Sherman Act; (2) that it could hamper efforts to prevent restraints on domestic markets; and (3) that monopolization of export trade might result from its passage (*e.g.*, 56 Cong. Rec. 175, 4723). However, the sponsors of the bill contended that it contained ample safeguards against restraints on domestic markets, and that the bill's ultimate effect would be to promote American trade abroad and provide a powerful boost to the post-war economy. Opponents were expressly assured that the statute did not constitute a repeal of the antitrust laws (56 Cong. Rec. 172).

We realize that passing recognition was given during the congressional debates on the legislation to the existence of extensive loans which the American government was making to certain foreign countries because of the impact of World War I on the economies of those nations (see 55 Cong. Rec. 2789, remarks of Congressmen Kenyon and McCumber), and to the probability that the purchasing power of these loans would be reduced somewhat as a result of the enactment and implementation of the proposed statute. But those were loans for which repayment from the various foreign governments was expected, not grants of the kind which have characterized our modern-day foreign aid program and which are involved in the instant case. Thus, Congress cannot fairly be regarded as having contemplated that American taxpayers would in effect be required to subsidize the anticompetitive conduct being authorized. What Congress foresaw was that when World War I ended the commercial struggle for foreign sales which had been carried on through private trade channels would resume. Its essential purpose was to strengthen the hand of American exporters in that struggle (see 56 Cong. Rec. 108, remarks of Senator Kellogg), but only so long as and to the extent that no adverse effects on the American economy resulted. Congress thus cannot be properly said to have envisaged and sanctioned transactions under the foreign aid program such as are involved here (cf. App., *infra*, p. 39).

Not only does the legislative history show that the exemption was intended to have a narrow scope; the

language of the statute is quite clear in this regard. Indeed, Congress went to great lengths to write into the Webb-Pomerene Act strict limitations against activities which might restrain domestic trade. It provided in Section 1 that "[t]he words 'export trade' * * * mean solely trade or commerce in goods * * * exported, or in the course of being exported from the United States * * * to any foreign nation * * *." This is qualified by a negative proviso excluding sales for domestic resale or consumption. Section 2 defines the precise exemption: "Nothing contained in [the Sherman Act] shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade * * * or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States * * *." That section further leaves without the scope of the exemption, and thus within the ambit of the antitrust laws, any agreement, understanding or conspiracy, or act which artificially enhances or depresses prices within the United States, "or which substantially lessens competition within the United States or otherwise restrains trade therein." In short, "the wording of the statute," which the court below found conclusive (App., *infra*, pp. 22, 37), confirms that Congress was dealing with a narrowly defined problem and intended to address itself only to that problem. Its purpose was to exempt from the antitrust laws only those aspects of foreign trade which it sought to foster. A construction

of the term "export trade" should accordingly be consistent with this basic purpose and reflective of the limiting language included in other parts of the Act.

Thus, the policy reflected by the statutory language, by the Federal Trade Commission's report, by the committee reports* and by the congressional debates indicates that the legislation was never intended to apply to transactions which directly affect the American economy in an adverse way. Since, as the court below recognized (App., *infra*, pp. 32–34), the full cost and responsibility for foreign aid procurement is assumed by the United States Government, the concerted price-fixing and business allocation practices of the defendant companies through the Association have denied our domestic economy the benefits of competition for the goods procured, and to that extent have restrained trade within the United States.

3. This conclusion cannot be averted by simply holding, as did the court below, that under the foreign aid program the actual purchaser is the recipient

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*S. Rep. No. 109, 65th Cong., 1st Sess., p. 2, adopting S. Rep. No. 1056, 64th Cong., 2d Sess., states: "[W]hile the purpose of these [export trade] associations is to improve and extend our foreign trade, their business ought to be so conducted as to harmonize with the requirements of our laws respecting domestic trade and without injuring any domestic competitor in the foreign trade or unduly thereby enhancing prices to domestic consumers." Similarly, H. Rep. No. 50, 65th Cong., 1st Sess., p. 3, adopting H. Rep. No. 1118, 64th Cong., 1st Sess., states: "The bill does not authorize any violation of the present antitrust laws. * * * [It] prohibits the slightest violation of our antitrust laws within the United States, but makes it clear that American exporters doing business in foreign countries are to be allowed to do business in those foreign countries according to the foreign laws."

nation, not the United States. The concept of "purchaser", for purposes of the antitrust laws, is not dependent upon the form of the transaction but its economic consequences. Concepts of private contract law must give way before federal antitrust policy. *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 18. Moreover, the district court's holding that Korea is the "purchaser" of the eleven phosphate shipments involved here is wrong under both the stipulated facts and the court's own findings. As a matter of legal form, the United States was the actual purchaser in the two transactions arranged through GSA; and as a matter of legal and commercial substance, it was the actual purchaser in the others as well. The court found that the United States "initiated, directed, controlled and financed" the transactions (App., *infra*, p. 34). It recognized that at any time prior to actual delivery the government, through AID, could divert the shipment or cancel it. If the regulations governing the procurement were violated, it was American law, not Korean law, which defined the remedy, and if a false claim for payment has been made, it would have been the United States, not Korea, which had the remedy.

The fact that the commodity was procured for shipment to and use in Korea, rather than for domestic consumption or resale, does not make the United States any less the actual purchaser. Procurement for the benefit of foreign countries is what the foreign aid program in essence involves. In transactions of this kind the buying power of the United States is sub-

stituted for the recipient country's lack of it, and since the United States is paying the bill, it also controls the transaction from beginning to end.[10] If anything, the *raison d'etre* of the foreign aid program, on which the court below relied (App., *infra*, p. 34), demonstrates that in the context of this kind of transaction, it is the United States which is indisputably the purchaser of the goods procured and shipped abroad.[11]

4. While the district court recognized the unfairness of imposing the burden of non-competitive purchasing on the American economy, it found this consideration unpersuasive. Although such concerted activities are likely to increase the cost of foreign aid to the United States and thus limit the effectiveness of appropriations for this purpose, the court held that

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[10] The benefits of the AID program to American foreign policy also fail to qualify as a net transfer of wealth to this country in payment for the "export trade (cf. App., *infra*, p. 38). The intangibles of foreign policy gains and losses are not consideration for the sale of commodities in any economic sense.

[11] Other factors on which the district court relied in finding the Webb-Pomerene exemption applicable (App., *infra*, pp. 34–36) are no more convincing. As to the counterpart fund arrangement (see note 3, *supra*), the funds are restricted to use in Korea and may be used by that country as well as by the United States. This is simply not the equivalent of repayment in any meaningful sense. Indeed, it was stipulated that the recipient country is under no obligation to repay the United States. Thus, the transactions cannot be legally characterized as a loan of funds and technical services to Korea. And, as to the locus of the risk of loss after shipment, this is simply a convenient assignment of responsibility under the terms of the grant. It is clear that the United States retains full control over the shipment until it is actually delivered.

this was not a matter of antitrust concern. In its view, AID knew it was dealing with a Webb-Pomerene association and had ample regulatory authority to protect itself and the United States generally by requiring reasonable and competitive prices.

Such a view again misconceives the antitrust context of the instant case. However sweeping an agency's regulatory powers over procurement might be, they cannot supplant the antitrust laws as the basic safeguard of the competitive process. In those laws Congress has condemned collusive activity. When the objectives of our foreign aid program are frustrated by such activity, they are entitled to full protection under the antitrust laws without regard to other means of protection the government may have.[12] Otherwise, the scope of the Sherman Act as applied to government procurement activities would depend upon the discretion of executive officials and not upon Congress and the courts.

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[12] In 1966, while the instant case was pending in the district court, AID promulgated certain regulations which require exporters bidding on U.S.-source-only procurements to certify that they have not acted in concert in this regard. 22 C.F.R. 201.52(7). This requirement does not in terms apply to the transactions involved here since it was stipulated that the source for the phosphate procurements was not limited to domestic suppliers.

CONCLUSION

The appeal presents an important statutory question under the antitrust laws which was wrongly decided below. Probable jurisdiction should be noted.

Respectfully submitted.

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FEBRUARY 1968.

APPENDIX

United States District Court for the Southern District of New York

64 Civ. 3914

UNITED STATES OF AMERICA, PLAINTIFF

-v.-

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., AMERICAN CYANAMID COMPANY, W. R. GRACE & CO., INTERNATIONAL MINERALS & CHEMICAL CORPORATION, TENNESSEE CORPORATION AND SOCONY MOBIL OIL COMPANY, INC., DEFENDANTS

OPINION

RYAN, *J.*:

This is an action brought to enjoin the price-fixing and business allocation activities of five fertilizer producers in connection with sales of fertilizer, made under the United States Foreign Aid Program, which was destined for the Republic of Korea. The challenged activities were conducted through the defendant Concentrated Phosphate Export Association, Inc. (CPEA), organized by the other defendants, or their respective corporate predecessors, in 1961. All facts have been stipulated. The question of law presented is whether the exemption from the Sherman Act provided for in the Webb-Pomerene Act applies to these transactions.[1]

[1] Section 1 of the Sherman Act, as amended, 26 Stat. 209, 15 U.S.C. 1, provides in pertinent part:

The parties have stipulated as follows:

> The issue presented by the pleadings in this case is whether the Concentrated Phosphate Export Association, Inc., a non-profit membership corporation organized and operated under

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Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *.

Section 1 of the Webb-Pomerene Act, 40 Stat. 516, 15 U.S.C. 61, provides in pertinent part:

> The words "export trade" * * * mean solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but the words "export trade" shall not be deemed to include the production, manufacture or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale.

Section 2 of the Webb-Pomerene Act, 40 Stat. 517 (1918), 15 U.S.C. 62, provides:

> That nothing contained in (the Sherman Act) shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States and is not in restraint of the export trade of any domestic competitor of such association: And provided further, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.

the Act of April 10, 1918, Ch. 50, 40 Stat. 516, 15 U.S.C. 61–65 (commonly known as the Webb-Pomerene Act), and its members violated Section 1 of the Sherman Act (15 U.S.C. 1) in connection with that portion of the Association's sales of phosphatic fertilizer which such Association made for shipment to the Republic of Korea, where the Board of five Directors of the Association composed of one Director for each Member agreed on selling prices and on allocation of sales among such Members, when United States Government foreign aid funds were made available to pay for said phosphatic fertilizer shipments in accordance with statutes, treaties and regulations applicable to the U.S. foreign aid program.

Plaintiff, conceding that the transactions involved were exports from Florida to the Republic of Korea, contends that because they were part of a United States program of foreign aid, controlled, managed and funded by the Government, they are not "export trade" within the meaning of the "Webb-Pomerene Act" and consequently were in violation of the anti-trust laws. The defendants rest squarely on the Act and answer that since these transactions were literally exports, the fact that they were shipped under the foreign aid program cannot convert them into domestic sales excluded from the statutory immunity. Plaintiff does not otherwise dispute the lawfulness of CPEA's operations under the Webb-Pomerene Act and the only question, therefore, is the application of the Act to these sales.

Plaintiff's reasoning is that the sales in question do not come within the Webb-Pomerene Act because they do not constitute export trade in that they were such an integral part of a United States program which paid for and closely controlled them, that they were tantamount to purchases made by the United

States for the benefit of the Republic of Korea and are therefore domestic sales. Plaintiff also urges that, even if these transactions be held to be export trade, they were never within the contemplation of Congress when it legislated the immunity because (a) there was at that time no Foreign Aid Program in which the Government assumed the financial burden and cost for these commodities sold; (b) the price-fixing activities of the defendants injured the United States. The Government also urges that there is no necessity for these defendants to have the benefit of the immunity of the Act for they were not required to meet unlimited competition from suppliers abroad in foreign aid sales. Finally, the Government contends that a contrary interpretation of the immunity of the Webb-Pomerene Act would destroy the purpose of the exemption and frustrate the foreign aid program as well as the Sherman Act.

Summed up, the Government's argument is one a posteriori: from the conclusion that price fixing is per se illegal under antitrust principles in that injury to competition and to the public is presumed, it takes but one step back to conclude that ergo the United States and its citizens, who bore the cost initially of these fixed prices, must have been hurt. The Government reasoning that this was not intended by Congress when it immunized certain sales reaches a conclusion that these sales do not come within the exemptions of the Webb-Pomerene Act, that they are in violation of antitrust law, and, being "illegal per se", are to be struck down.

We have concluded that the answer lies in the wording of the statute. Let us, first, summarize the facts necessary to an appreciation of the question presented.

There is no dispute as to the accuracy of facts advanced by either party in support of its position. They do differ as to relevance and materiality of some of these facts and, of course, as to the conclusions to be drawn from them. The cooperation of counsel at pretrial hearings produced a statement of stipulated facts with exhibits attached; we turn to these:

The defendants are:

CPEA—a non-profit Delaware corporation with its principal place of business in New York, New York, organized on September 12, 1961 to engage solely in export trade as the term "export trade" is defined in the Webb-Pomerene Act, and specifically to engage in trade and commerce in the product known as triple superphosphate and certain other concentrated phosphatic materials. (At all material times, CPEA has been duly registered with the Federal Trade Commission as an association organized and acting under the Webb-Pomerene Act.)

CPEA's five Members: W. R. Grace & Co.; Tennessee Corporation; Socony Mobil Company, Inc.; American Cyanamid Company and International Minerals and Chemical Corporation.[2]

Each of these defendant members is a domestic corporation producing chemical fertilizers known as "concentrated phosphates".

CPEA acts as an export selling agency for the concentrated phosphate products of its members. These products are shipped from Florida to Korea and other foreign ports. CPEA handles all phases of developing and negotiation of these sales and this includes all details, such as the submission of bids, shipment, transportation and billing. The management

[2] International Minerals and Chemical Corp. withdrew its membership on June 30, 1966.

of CPEA is provided for in its by-laws. It is vested in a Board of Directors equal in number to the number of members with each member entitled to nominate one director. CPEA at all times since its formation has been governed by the Board of Directors, each director representing one of its members. The Board of Directors established the minimum price at which materials would be sold by CPEA and the price at which the member would sell to the Association. The Board of Directors also allocated the available business among the members in accordance with the procedures set forth in the Membership Agreements.[5] None of the members bid as individuals on the Korean foreign aid procurements here in suit, all such sales were handled by CPEA.

The Government does not challenge the lawfulness of defendants' operations under the Act except as specifically stated in the issue stipulated. Thus, it does not charge that defendants have in any way restrained the domestic export trade of a competitor or enhanced or depressed prices within the United States—activities which under the wording of the Act would deprive them of its immunity.

There were 13 shipments made from September 1961 (when CPEA was formed) through 1966, in which concentrated phosphates were procured "for shipment directly to and use by the Republic of Korea." This action is concerned with but 11 of these shipments. The materials procured and the costs of

[5] As required by the Act, copies of CPEA's corporate charter, by-laws and membership agreement were filed with the FTC. Annual reports for the years 1961–1965 were also so filed, as well as special reports of annual sales volumes. In 1964, at the Commission's request, CPEA submitted a report separately stating the dollar volume of CPEA's 1961–1962 sales believed to have been subject to AID financing.

these shipments "were paid for with funds from the United States Government made available under its foreign assistance program to the Government of Korea", administered by AID,[4] or its predecessor ICA.[5]

One of the other two shipments was financed with Korean Foreign Exchange Funds, and the other shipment was financed out of a special Stabilization Fund granted in 1961 by the United States to the Republic of Korea to meet Korea's need for foreign exchange and to offset the anticipated short-term reduction in Korea's dollar earnings resulting from Korea's major reform in 1961 of its monetary exchange system. Neither of the two shipments was made subject to ICA or AID regulations; both were handled in accordance with OSROK's[6] applicable procurement procedures. Although payment for this last mentioned shipment was made with United States funds the Government does not challenge the lawfulness of this transaction.

The authority for the foreign assistance program since 1961 is contained in the Act for International Development of 1961 (AID) (22 USC 2151, 75 Stat. 424, 427), which provides authority to the President "to furnish assistance on such terms and conditions as he may determine in order to promote the economic development of less developed friendly countries and areas, with emphasis upon assisting the development of human resources through such means as programs

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[4] "AID"—Agency for International Development, an agency of the United States Department of State, established in 1961.

[5] "ICA"—International Cooperation Administration, the predecessor agency of AID.

[6] "OSROK"—Office of Supply, Republic of Korea, the Korean governmental agency responsible for procurement of commodities for the Government of Korea.

of technical cooperation and development." (Sec. 211)

Among the terms and conditions, which must be met before eligibility for foreign aid is determined, is that the President find that the assistance proposed would not have a substantially adverse effect on the United States economy.

Following World War II, the United States Government made funds available to many countries, to pay for commodities, including fertilizer, sold by commercial companies and shipped from the United States and other free-world sources to the recipient countries. Foreign aid funds have been made available from time to time both prior to and after 1961 to pay for various commodities such as fertilizer including concentrated phosphates for the Republic of Korea through Acts of Congress beginning with the Mutual Security Act of 1954.[1]

This assistance is made available to Korea through various treaties and agreements. The relevant agreement here is "The Economic Technical and Related Assistance Agreement between the United States and the Republic of Korea of February 8, 1961". Concern for the economic and general welfare of the United States in the furnishing of this foreign aid is reflected in this Agreement for it is provided that the assistance to be given shall be subject to applicable United States laws and regulations. It is also provided that the Korean Government is to cooperate with the United States Government to assure that procurement will be

[1] Although plaintiff disputes their similarity, defendants say that foreign aid programs go back at least to 1948 and the Marshall Plan and even farther to the time the Webb-Pomerene Act was enacted, when Congress also enacted the Organization of American Relief in Europe in 1918. The significance of this will appear later.

at reasonable prices and on reasonable terms. It is further provided that

> All or any part of the program of assistance provided hereunder may be terminated by the Government of the United States if it determines that because of changed conditions the continuation of such assistance is unnecessary or undesirable.

The Foreign Aid program was supported by funds appropriated annually by Congress on budget requests and recommendations of the State Department and AID, stating the basis of detailed proposals which were made following negotiations with foreign countries seeking assistance. The funds appropriated by Congress were made available by AID in the form of loans or grants in accordance with the applicable statutes, agreements, and regulations. Foreign aid funds have not been used to procure commodities for use for resale in the United States.

The expenditure of funds AID allocated for Korean commodity imports was subject to AID's approval of "Procurement Authorization Applications", submitted by agencies of the Korean Government to AID from time to time. AID's approval of Korean fertilizer procurements was made either in the form of a "Procurement Authorization" issued to OSROK or a "Procurement Authorization, U.S. Government Agency Purchase Requisition" issued to GSA.

AID, which was officially characterized as essentially a financing institution, did not itself procure any concentrated phosphates for Korea.

The Government of Korea had no obligation to repay the amounts granted by the United States, but the concentrated phosphates procured with AID financing were sold to Korean consumers by a Korean

Government agency and the Korean currency (hwan) received from such sales was deposited by the selling agency in an account at the Bank of Korea in accordance with agreements between the United States and Korean governments. The Korean currency generated by such sales was not necessarily equal to the United States dollar value of the fertilizer sold. Such deposits were called "counterpart funds" and were used to support, in part, Korean and United States military establishments in Korea and for other purposes mutually agreed upon by the governments of the United States and Korea, including financing public works projects of the Korean Government. These funds were also available to the United States "as requested" but the Korean Government could also draw against them. Agreement between the two countries as to the disposition of unencumbered balances was subject to approval of Congress.

It appears that of the 13 transactions in which Korea purchased concentrated phosphates for import and consumption, 11 were handled directly by OSROK issuing the invitation for bids and that the other 2 transactions were handled by General Services Administration (GSA). Where OSROK was the procuring agency, CPEA registered in Korea as a bidder as required by Korean regulations, and its bids were submitted there to OSROK and shipped on OSROK's call or requisition. OSROK, as buyer, handled the insurance; all disputes arising from the performance under the contract were adjusted and settled in Korea.

The following administrative procedure was taken where the procurement authorization issued to OSROK:

1. OSROK's submission to AID of a Procurement Authorization Application.

2. AID's issuance of a Procurement Authorization, a portion of which constituted a letter of commitment by AID to a specified United States Banking Institution to reimburse the bank for payment made to suppliers of the material being procured.

3. Invitation for Bids issued by OSROK requesting bids in compliance, inter alia, with AID Regulation No. 1.

4. AID's issuance of a Small Business Circular entitled "Trade Opportunities for American Suppliers", publishing the initiation for bid.

5. OSROK's Abstract of Bids received.

6. Lists of Successful Bidders prepared by OSROK and transmitted to AID.

7. Notice of Award issued by OSROK and in this instance addressed to CPEA.

8. Notice to supplier of Opening of Letter of Credit.

9. Letter of Credit with conditions issued to CPEA by J. Henry Schroder Banking Corporation, New York, hereinafter called "Schroder Bank".

10. A performance bond of the supplier.

11. Voucher of Schroder Bank to the United States Government claiming payment and stamped by the United States Treasury Department as "paid," and attached documents in support thereof, including the invoice of CPEA and its Supplier's Certificate.

OSROK described on its application the type and amount of fertilizer it required; the proposed area of source; the proposed basis and time of delivery; the United States Banking Institution; the estimate of cost; how it would ship the commodities f.o.b. on United States flagships; how it would evaluate the bids; the condition of the fertilizer (that it meet United States Federal Specification Inspection

terms); and a detailed "End-use Justification" for such authorization.

Where GSA was the procuring agency, it issued "Invitations for Bids" on its standard form and its acceptance of any bid was endorsed at the foot of the face page of the form in the name of the "United States of America by the Contracting Officer". Bids were invited to be submitted to GSA which indicated the recipient country, and code and delivery was specified as FAS or FOB vessel.

The bid tabulation of GSA shows that bids were received for delivery FOB vessel at Tampa, Florida, and for delivery FOB vessel in Tunisia and Portugal. Awards to successful bidders were made after review by GSA personnel. Invoices with supporting documents, including bills of lading, were submitted to GSA for payment. The shipper was designated as GSA with consignment to OSROK. Delivery by the supplier was established by a "Material Inspection and Receiving Report.".

In short, GSA handled all incidents of the procurement from the invitation to bid to acceptance at the point of shipment, made shipment of the goods and made payment of the freight as well as payment of the purchase price.

The details of the control which the United States Government exerted over the Foreign Aid Program are spelled out in the Regulations adopted by AID for carrying out the program.

Upon the filing of a Procurement Authorization Application by the cooperating country to procure specified commodities against its allotment of AID funds, AID issued the Procurement Authorization after determination that the proposed purchase was in accordance with the objectives of the Act. The Procurement Authorization issued by AID either to

OSROK or to GSA specified the commodity and the maximum amount of money which would be provided, the delivery periods, the source from which the commodity might be obtained, and other provisions deemed necessary by it.

Among the requirements imposed by Regulation 1 upon the cooperating country is that at least fifty percent of the gross tonnage of all commodities financed by AID transported by ocean vessels to the cooperating country must be carried in privately owned United States flag commercial vessels. Another is that where formal competitive bidding is used, as was done with all the relevant procurements, copies of the invitation for bids must be sent to the Office of Small Business, AID, to give United States suppliers an opportunity to bid.[8] It also was further provided that if it appeared that "the objective of lowest competitive market price is not being met," AID would take appropriate action to impose additional limitations and might require a refund of the entire amount or as against the supplier of the amount by which the price exceeded the maximum price permitted by the regulation. Specific calculations were set forth for determining the permitted maximum price where there was no available competitive market. Even in instances of delivery FOB, AID reserved the right to divert the shipment at any time before delivery and to vest title in transit "if necessary to assure compliance with any Act of Congress."

As to the Supplier, Regulation 1 also required that, to obtain payment, the Supplier (here the defendants) had to complete an AID form called the Supplier's Certificate in which he acknowledged that the procure-

[8] It is stipulated that in all 13 purchases CPEA directly competed for AID financed sales to Korea with domestic and eligible foreign producers of concentrated phosphates.

ment was to be paid for from funds made available by the United States pursuant to AID Regulation 1. The Supplier agreed to make appropriate refund to AID upon demand, in the event of non-performance under his contract, for any breach of the certificate or for any false certification. The Supplier in addition certified that (1) the price did not exceed the market price; (2) that he had not given or received and would not give or receive any side payments or "kickbacks"; and (3) that he had not paid any contingent fees or commissions except as stated. This certificate, under "Notes", provides "(b) False statements herein are punishable by United States law." An important modification of the form certificate made in 1964, further provides that the agreement between the supplier and AID incorporated in the certificate shall be deemed to be a contract made under the laws of the District of Columbia. The 1964 revision requires too that the supplier maintain his records for a period of at least five years available for examination by AID.

As to the banks involved, Regulation 1 spelled out the responsibilities of the banking institutions. Generally, the bank is responsible for collection of the documents required, including the Supplier's Certificate, and for determining whether "in accordance with good commercial practice" the shipment complies with the requirements set forth in the letter of commitment as to delivery, source, destination, description and discounts or commissions. While the American bank operates under a letter of credit from the Bank of Korea, it looks not to the Bank of Korea but to the United States Government for payment, under the letter of commitment issued by AID to the bank set forth in AID's agreement to reimburse the bank for payments made against the account of the

approved applicant which may be applicable to the procurement.

Adherence to these requirements was a condition imposed on suppliers by the Korean Government under OSROK's General Provisions for Bidding. These provisions limited the Korean Government's contractual liability to the suppliers by conditioning its obligation on the receipt by the latter of the pertinent letter of commitment from AID.

The control of the United States over the OSROK's procurements is clearly defined. This control is even more evident in those instances where GSA was the procuring authority, for there, although Korea appeared as the "recipient country", the award was signed on behalf of the United States of America who, through GSA, made payment to the bank upon submission of invoices to it by the supplier. By agreement between GSA and AID's predecessor, ICA, AID provided GSA with funds to pay for the cost of commodities. Following ordinary usual Governmental bidding procedure, the bids were sent to Washington and one of the standard bidding provisions was that the contract would be awarded to the bidder whose bid was most "advantageous to the Government, price and other factors considered."

One cannot logically dispute plaintiff's conclusion that the GSA procurements represent the ultimate in control by the United States over the expenditure of foreign aid funds in the Korean fertilizer procurement and that they emphasize the close regulation and control provided for to insure the proper and judicious expenditure of United States funds under the foreign aid program.

We do question the Government's further statement that by reason of this control the real contracting

party for the commodities was the United States and that the transactions were therefore not "export trade", but domestic trade. We find to the contrary—the transactions were "export trade", especially in view of the concession by the Government that the goods sold by defendants were "for shipment to the Republic of Korea" procured by or on behalf of Korea by either OSROK or GSA acting as "the procurement agency" and that the commodities were used in Korea.

We also do not accept or agree with defendant's argument that AID was but an incidental party to the transaction—no more than the usual financing institution found in international transactions where there are problems of currency exchange. AID was at the center of the transaction: it was the force which initiated, directed, controlled and financed them. Without AID, there would have been no sale or purchase and the extent of the role it played was known in every detail to and relied on by both parties to the transaction, particularly by the supplier who looked to [AID] for payment and obligated itself to conform to its requirements and conditions if he was to receive payment. We find, however, that defendants were selling to the Korean Government. This we find, that the transaction was an "export" even where GSA was described in its procurement authorization and related documents as the "purchaser". The AID regulations referred to these transactions as "exports". It has been stipulated that AID did not purchase concentrated phosphates for consumption or resale. It is plain from the stipulated facts and from the very raison d'etre of the foreign aid program that the "cooperating country" and not the United States is the purchaser.

Plaintiff also stresses as an important factor that the Korean Government was under no obligation to

repay these "grants" or "loans". But we find this not to be the fact for, while Korea may not have signed a promissory note payable on demand in equivalent funds with interest, it did obligate itself to the extent that the Korean funds it received on re-sale of the commodities were to be deposited and used by it in accordance with its agreement with the United States and to be available to the Government of the United States in the manner required by it. This condition was hardly consistent with an outright gift of money to Korea. Indeed, the Government itself has pointed out that, despite the general statement of the purpose behind the Foreign Assistance Act, the Act makes it clear that Congress had no intention of writing a "blank check" for the underdeveloped countries to spend at will. AID Administrator David E. Bell, before the Senate Banking and Currency Committee (111 Cong. Rec. 5373 (1965)), testified:

> The foreign aid program provides goods and services to other countries which they cannot obtain through normal means—through their export earnings and through obtaining capital on commercial terms and by private investment. A successful aid program is one which enables the recipient country to strengthen its economy to the point where it can obtain goods and services it needs for steady expansion and growth by normal trade and normal capital movements—and without further need for aid grants and soft loans * * * It is plainly important to seek to carry out this important national program like any other, at minimum cost to the United States.

The commodity involved in these transactions was produced in the United States. It was loaded on ocean

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* Neither the tender nor award documents nor AID regulations make any distinction between the two forms of financing.

going vessels sailing from a United States port, with shipping documents naming the Korean Government as consignee and Korea as the destination. The risk of loss was not with the supplier for title passed from the supplier to OSROK (or the designee of ICA) and the Korean Government was named as shipper and consignee in the f.o.b. vessel bills of lading. The sales in question are clearly "export trade" and exempt from the antitrust laws unless it is provided to the contrary in the Webb-Pomerene Act.

This brings us to plaintiff's second argument, which is that, although the transactions may be literally export trade, in the context and against the background of the Act, they are not or cannot be the export trade intended by the Act, and that an examination of the legislative history of the Act demonstrates that it was not Congressional intent to include this type of transaction within the statutory exemption, for the reason that it never contemplated this type of transaction where the United States Government was the financing party. The argument of the Government, attempting to divine a Congressional intent, continues that had Congress contemplated such foreign aid transactions would occur, it would not have exempted them.

In support of this ingenious argument, the Government puts emphasis upon the fact that Congress in the Act made it clear that the activities exempted were not "to operate to the prejudice of the American public" or "punish the people of the United States" and that, if that should be the result of the activities, they would not be immune. The Government further argues that the defendants frustrated the AID "objective of lowest competitive market prices" because, in aggregating the manufacturing and selling resources of five very substantial size companies, whose competitors, in most of the larger procurements herein,

could furnish only a limited portion of the requirements, defendants eliminated much of the competition which would otherwise have existed. Having thus frustrated the objectives of the foreign aid program, the Government reasons defendants cannot now claim the immunity of the provisions of the Webb-Pomerene Act simply because of the format of their Association.

It may be that competition within the United States was curtailed among those five, although it has been stipulated that all CPEA-AID financed sales were obtained as a result of competitive bidding and that CPEA has faced world-wide competition for all sales from eligible sources. The argument concludes that, since Congress could not have intended to protect activities which injured the United States, the activities of the defendants are not protected and ergo come within the antitrust laws and are illegal under them.

Much as plaintiff strains at the meaning of the words "export trade", we are unable to find any ambiguity in them.

"To export" had at the time the Act was enacted the same meaning that it now has—"to carry or send aboard, especially to foreign countries." There is nothing to indicate that the Congress did not intend them to have this meaning; the Act itself refers to export as "goods exported from the United States to any foreign nation."[10] On the face of the statute, the transactions were exempt from the antitrust laws.

Judicial construction should be used not to create doubt, but only to resolve one. Where there is no

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[10] The Act specifically defines what is excluded from the words "export trade" by stating that they shall not be deemed to include the production, manufacture or selling for consump-

doubt, there is nothing to construe (*United States* v. *Rice*, 327 U.S. 742, 753; *Hamilton* v. *Rathbone*, 175 U.S. 414). We should not under the guise of "construction" rewrite the statute; obviously, this is not a judicial function. (*Palmer* v. *Massachusetts*, 308 U.S. 79, 83 (1939).)

The distinguishing feature, observes the Government, is that "In the context of the era and Congressional attitude, as reflected in the legislative history, 'export trade' has the common meaning of United States goods shipped to foreign nations and paid for by foreign buyers in a net transfer of wealth to this nation."

Accepting this definition, foreign aid financed trade is foreign trade, since there is a "net transfer of wealth to this nation", if not in dollars, certainly in its equivalence by the assurance of the economic and military stability of friendly nations. The return of wealth to this country may well be incalculable and far exceed measurement in dollar and cent standards.

But, in support of its position that Congress never envisaged immunizing transactions of this sort when the United States was the one paying the fixed price, the Government points to the purpose of the Webb-Pomerene Act, which appears to have been to enable

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tion or resale "within the United States" which it defines as trade "among the several states".

The United States Department of Commerce gives the official definition of exports as "'he physical movement of merchandise out of the United States customs to foreign countries without regard to the method of financing." Census Bureau, Monthly Report of U.S. Exports Report F.T. 410.

In 1903, the Supreme Court defined the word "export" as used in the Constitution and the laws of the United States to mean the "transportation of goods from this to a foreign country." *Swan & Finch Co.* v. *United States*, 190 U.S. 143, 146.

the domestic companies to compete with lar[illegible] foreign combines by permitting them to combine [illegible] capital and establish selling agencies to reduce their expenses of advertising and cultivating world trade as well as to affect the power of cartels. (H.R. Rep. #50, 65th Congr., 1st Sess. p. 2, 1917; 55th Cong. Rec. 3576 and 2785.)

Defendant say that it had another purpose—foreign aid, because at the time that Congress was making extremely large appropriations for foreign assistance and was authorizing the issuance of bonds to provide the funds for those appropriations under the form of "export credits" to be expended by the foreign countries for the purchase of American goods, there was no real prospect that these loans or credits would be repaid. Therefore, defendants urge that Congress did envisage the transactions in suit.

In further support of its argument, the Government contends that it is clear from the discussions leading up to the exclusions contained in the Act that the reason Congress immunized these trade export associations was that Congress was not overly concerned with what price was being exacted of a foreign purchaser, because there the American public was not bearing the financial brunt.

Herein is the core of the Government's argument; we cannot say that it does not hav[illegible]peal. It seems obviously unfair to the United States, which paid these defendants, to permit the defendants to charge an artificially set price and deprive the Government of price benefits which might come from competitive trade conditions within the United States.

It is plain from the remarks of the proponents of the Act made in Congress when the Act was being considered that they were concerned that no injury befall to the domestic purchaser from this Act.

The remarks of Senator Pomerene were, in part, that:

> * * * although an association organized under the pending bill should enter into some agreement or perform some act in a foreign country which met the requirements of law there, if at the same time the effect of it were such as to materially interfere with the policy of the United States under its trust laws, then it would be subject to the jurisdiction of the authorities of this country, including both the Federal Trade Commission and the Department of Justice. (56 Cong. Rec. 170)

Congressman Webb stated:

> I would be willing that there should be a combination between anybody or anything for the purpose of capturing the trade of the world, if they do not punish the people of the United States in doing it. (55 Cong. Rec. 3580)

Another proponent of the bill said that its purpose was "to make that which is illegitimate relating to the people of the United States perfectly legitimate when relating to foreign peoples;" (55 Cong. Rec. 2788); and that it was not the duty of Congress to look after the interests of foreign nations.

The Report of the Senate Committee states:

> But while the purpose of these associations is to improve and extend our foreign trade, their business ought to be so conducted as to harmonize with the requirements of our laws respecting domestic trade and without injuring any domestic competitor in the foreign trade or unduly thereby enhancing prices to domestic consumers. (Sen. Rep. No. 109, 65th Congr., 1st Sess. p. 2 (1917).)

It was because Congress was concerned that the Act be not used to the detriment of domestic trade that it limited immunity to an association, agreement or act

which was not in restraint of trade within the United States and not in restraint of the export trade of any domestic competitor of such association or which artificially, or intentionally, enhanced or depressed prices of lessened competition or restrained trade within the United States, none of which is charged here.

The Government's final argument is that the defendants' activities burdened and frustrated the Foreign Aid Program because the burden of any price-fixing activities as to foreign aid procurements is borne directly by the American taxpayer, not by a foreign nation or consumer as in the ordinary export trade transaction. The added charge upon AID financed procurements, it urges, limited the attainment of the United States' foreign aid objectives.

It is undisputed, however, that officials of AID, OSROK and GSA were aware of CPEA's status as a "Webb" association; its membership was no secret to them; and they knew CPEA's material was being offered for sale in response to invitations to bid to supply phosphatic materials for shipment directly to Korea. Defendants, along with other "Webb" associations, were encouraged by the Government agencies to participate in these programs.[11] It is true that this was an entirely business-motivated participation of the "Webb" associations but that is not to say that all these associations fixed prices and allocated territories for there is no evidence one way or the other. We

[11] Webb associations other than CPEA have sold and are selling under the AID program and have sold under foreign aid programs administered by ICA. In addition, under different statutory and regulatory requirements, the U.S. Government has furnished funds to finance export sales of agricultural products by Webb associations under the Public Law 480 program administered by the United States Department of Agriculture. Webb associations sold, too, under the Lend Lease program at least from 1941.

assume, however, if several competitors do join in such an association, they do so for their mutual benefit.

Factually, it does appear that the activities of CPEA were known for as required by the provisions of the Webb-Pomerene Act, a report of CPEA's formation was made to the Federal Trade Commission (FTC) on October 6, 1961; and copies of the corporate charter, by-laws and membership agreements were filed with that report. All amendments to the charter and the membership agreements were reported to the FTC. CPEA also filed with the FTC annual reports for the years 1961 through 1965 in accord with provisions of the Webb-Pomerene Act, and responded to FTC's requests for special reports of, among other things, annual sales volume. In 1964, CPEA submitted to the FTC, at the Commission's request, a report which separately stated the dollar volume of CPEA's 1961–1962 sales believed to have been subject to AID financing.

If these activities were found to have been harmful to the foreign aid program, AID was not without remedy or means to discourage and stop such activities. Regulation I provided that the price was not to exceed the market price prevailing in the United States, or a price to be determined if there was no available market, with the privilege on the part of AID to seek a refund of the entire amount or of the excess charge and to cancel the transaction. These were terms to which the suppliers agreed. AID, however, has taken no action in this respect; perhaps, it is because it has found that the price, although artificially fixed, is not unreasonable.

All that we have before us is a claim of violation of antitrust laws.

We conclude that there is no violation of antitrust laws because the activities of defendants were immunized by the Webb-Pomerene Act.[12]

Complaint is dismissed upon the merits and the Clerk of the Court is directed to enter judgment of dismissal in favor of the defendants. So ordered.

(8) SYLVESTER J. RYAN,
U.S.D.J.

Dated: New York, New York, September 11, 1967.

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[12] Apparently the question of whether defendants who are selling in connection with foreign aid programs should enjoy such immunity is not novel. It appears that Congress has reviewed the Webb-Pomerene Act on a number of occasions over the years and, on such occasions, spokesmen for the Justice Department often have advocated its outright repeal. Congress, however, has thus far declined to either amend or repeal the statute.

United States District Court for the Southern District of New York

64 Civ. 3914

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., AMERICAN CYANAMID COMPANY, W. R. GRACE & CO., INTERNATIONAL MINERALS & CHEMICAL CORPORATION, TENNESSEE CORPORATION AND SOCONY MOBIL OIL COMPANY, INC., DEFENDANTS

JUDGMENT

This cause having been brought on regularly for trial before the Honorable Sylvester J. Ryan, United States District Judge, non-jury, on March 20th, 1967, and the Court at the conclusion of trial having reserved its decision, and thereafter on September 11th, 1967, having filed its memorandum opinion dismissing the complaint on the merits and directing the Clerk to enter judgment of dismissal in favor of the defendants, it is

Ordered, adjudged and decreed: that the defendants The Concentrated Phosphate Export Association, Inc., American Cyanamid Company, W. R. Grace & Co., International Minerals & Chemical Corporation, Tennessee Corporation and Socony Mobil Oil Company, Inc., have judgment against the plaintiff UNITED STATES OF AMERICA dismissing the complaint.

JOHN J. OLEAR, Jr.,

Clerk.

Dated: New York, N.Y., September 11th, 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted]29

UNITED STATES OF AMERICA, *Appellant*

v.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., ET AL.

On Appeal From the United States District Court for the Southern District of New York

APPELLEES' MOTION TO AFFIRM OR DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1102

UNITED STATES OF AMERICA, *Appellant*

v.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., ET AL.

On Appeal From the United States District Court for the Southern District of New York

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APPELLEES' MOTION TO AFFIRM OR DISMISS

Pursuant to rule 16 of the revised rules of this Court, appellees move that the Judgment of the district court be affirmed on the ground that the only question on which the decision of this cause depends is not substantial or of public importance and needs no further briefing or oral argument. In the alternative, appellees move under rule 16 to dismiss the appeal on the ground that an amended United States Government administrative regulation has ended the

activities complained of in this suit, and prevents their resumption, thereby mooting the question before this Court and rendering equitable relief unnecessary.

QUESTIONS PRESENTED

1. Was appellee Association's sale and shipment to a foreign country of goods financed under the government's foreign aid program, "export trade" within the meaning of the Webb-Pomerene Act?

2. Should this Court review the above question in the present case when appellee Association: (a) was organized and operated in a manner disclosed to and encouraged by the government; and (b) has been dissolved in consequence of amended AID regulations which now prevent the use of Webb-Pomerene associations for transactions which presently constitute substantially all AID-financed procurements of appellees' product?

STATEMENT

A. Background Facts

In 1961 the Concentrated Phosphate Export Association, Inc. (CPEA) was organized by five corporate producers of concentrated phosphate fertilizers to engage solely in "export trade" as defined in the Webb-Pomerene Act (15 U.S.C. 61-65) and was duly registered with the Federal Trade Commission (FTC) (Stip. 2).[1] CPEA acted as the export sales agency for

[1] "Stip." refers to the Stipulation of Facts in the district court, by paragraph number. "Stip. Ex." refers to Exhibits to the Fact Stipulation, by Exhibit number. CPEA's original members were: American Cyanamid Company, W. R. Grace & Company, Tennessee Corporation, International Minerals & Chemical Corporation and Virginia-Carolina Chemical Company (subsequently merged into Mobil Oil Corporation). (Stip. 3).

its members and, in its first five years, made sales to 39 foreign countries (Stip. 11, 13). Certain CPEA sales to Korea, financed with U.S. foreign aid funds, were challenged in this suit (Stip. 24). All of CPEA's sales to Korea were made in response to invitations to submit competitive bids to supply phosphatic materials for shipment directly to Korea (Stip. 33); all such material sold by CPEA was delivered directly from producing plants in Florida to Korea (J.S. 23; Stip. 26).[2]

Prior to and during the period covered by these sales Webb-Pomerene associations other than CPEA had sold under U.S. foreign aid programs, and an official publication of the Agency for International Development (AID) suggested formation of associations under the Webb-Pomerene Act as a method for United States companies to participate in AID-financed programs (J.S. 41; Stip. 29, Stip. Ex. 46). Not only the FTC, but officials of AID, which financed the transactions, officials of the Office of Supply, Republic of Korea (OSROK), which acted as the procurement agency for Korea on all but two of these transactions, and officials of the General Services Administration (GSA) which acted as the procuring agent for Korea on the two remaining transactions, were all fully aware of CPEA's status as a Webb-Pomerene association, and its membership (J.S. 41-42). Special reports showing the amount of CPEA's AID business were furnished to the FTC (J.S. 42).

In the court below the government charged only that CPEA's sales to Korea were not "export sales", and

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[2] "J.S." refers to appellant's Jurisdictional Statement, by page number. The opinion below will be cited as reported in the Jurisdictional Statement.

stipulated that it did not otherwise challenge the lawfulness of CPEA's operations (J.S. 24). The government also conceded that it made no claim that CPEA had overcharged or charged discriminatory or unreasonable prices in sales under foreign aid (T. 18, 32-33),[3] and withdrew the complaint request for dissolution of CPEA (J.S. 4). The government emphasized to the lower court that it sought only "prospective relief" (T. 73, 81).

The facts of the controversy were not disputed and the case was submitted to the lower court on a stipulated record (J.S. 23). The case was argued in March, 1967, and on September 11, 1967, the district court gave judgment for defendants and dismissed the complaint on its merits.

After the stipulated record had been submitted to the court below, AID amended its regulations to bar any financing after January 1, 1967, for transactions involving Webb-Pomerene associations, whenever U.S.-source procurement was required. 22 C.F.R. 201.01 (v); 201.52(a)(7); Appendix D; 31 Fed. Reg. 16693 (December 30, 1966).[4] The regulations require, *inter alia,* that with respect to transactions to which they apply, the supplier or producer of the commodity must

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[3] "T." refers to the Transcript of Oral Argument, by page number. See also J.S. 8, n. 5.

[4] The amendment of AID's regulations mentioned by appellant (J.S. 17, n. 12) and the additional facts recited above which took place after the matter was argued to the district court, were brought to the attention of the district court by joint action of the parties in the form of a proposed order vacating the court's September 11, 1967 Judgment and granting dismissal of the action. For procedural reasons, and since the Notice of Appeal had been filed, the parties did not press for adoption of the proposed order.

file a Certificate and Agreement Regarding Concerted Pricing (A.I.D. Form 285, Appendix A to the present Motion, p. 19, *infra*), certifying as follows:

> The price and quantity terms of the sale described by the attached invoice have been arrived at independently by the firm on whose behalf this Certificate is executed, without consultation or agreement concerning such price or quantity with any other bidder, offeror, competitor, or any member of an Export Trade Association (an Association within the meaning of 15 USC §§ 61-65), and without reliance upon any price established or recommended by any such Association.

The amended regulations apply to classes of transactions which presently constitute substantially all AID-financed procurements of phosphatic fertilizer.[5]

The corporate defendants, two of which resigned their membership in CPEA while the suit below was pending,[6] have all complied with this regulation. CPEA's remaining three members, forced by the regulation to work out their own individual company arrangements in export markets where AID financing was a possibility, found the usefulness and economy of CPEA's joint selling organization thereby ended. In June, 1967, before the lower court's decision was given, CPEA's members terminated CPEA's sales activities. On December 28, 1967, CPEA was formally dissolved.

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[5] AID does not report the proportion of procurement volume for which foreign companies are eligible suppliers. AID has disclosed that in Fiscal Year 1967, 98% of total AID expenditures for fertilizers were from U.S. sources (AID, Operations Report (FY 1967) p. 74).

[6] International Minerals & Chemical Corporation resigned on June 30, 1966; Mobil Oil Corporation resigned on March 15, 1967.

(The Certificate of Dissolution is attached as Appendix B to this Motion, p. 20, *infra*).

B. The Controlling Facts on the Merits

As noted above, this case involves the sale of phosphatic materials produced in Florida for shipment to and use in the Republic of Korea. In our view—and that of the district court—these facts qualified the transactions challenged by the government as "export trade" under the Webb-Pomerene Act (15 U.S.C. 61-65), and thereby exempted them from the antitrust laws. The other facts which were the subject of the stipulated record below become relevant only if the essential premise of the government's case is accepted —that is, if the plain meaning of "export trade" is abandoned. Accordingly, we will not undertake in this motion to correct all the omissions and inadvertencies in appellant's Jurisdictional Statement.

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. Indeed, because of events which occurred after the matter was submitted to the district court, the appellees have discontinued doing any business as a Webb-Pomerene association and have dissolved CPEA, with the result that the government has now received more relief than it prayed for in the court below. In consequence, the issue initially presented in this case has become moot.

A. The Appeal Is Insubstantial

1. The Webb-Pomerene Act exempts from the antitrust laws "an association entered into for the sole purpose of engaging in export trade and actually en-

gaged solely in such export trade, or an agreement made or act done in the course of export trade by such association * * *". "Export trade" is defined in Section 1 of the Act to "mean solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States * * * to any foreign nation * * * ". The trade here involved is the sale of phosphates from Florida for use in the Republic of Korea, and plainly qualifies as "export trade" under this definition.

As the district court said:

> "To export" had at the time the Act was enacted the same meaning that it now has—"to carry or send abroad, especially to foreign countries." There is nothing to indicate that the Congress did not intend them to have this meaning; the Act itself refers to export as "goods exported from the United States to any foreign nation." On the face of the statute, the transactions were exempt from the antitrust laws.[1]

The government does not contend that any other meaning can be derived from "the face of the statute". Rather, it takes the district court to task for its supposed failure "to give full weight to the antitrust context in which the Act operates" (J.S. 9; *see also* J.S. 8). In this "context", according to the government, special rules of statutory construction operate: "Webb-Pomerene is an exception to the antitrust laws, and it is a familiar principle that such exceptions are narrowly construed, even where a literal reading of a statute might lead to a broader exemption." (J.S. 9)

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[1] J.S. 37, footnote omitted.

But "narrow" construction does not justify disregarding the plain meaning of statutory language. Appellant's own authorities do not suggest otherwise.[8]. In *Milk Producers Ass'n* v. *United States,* 362 U.S. 458, antitrust exemption was denied because the disputed transaction did not come within the terms of the statute; the case provides no warrant for denying an exemption where a transaction does comply with such terms.[9] To be sure, in *California* v. *Federal Power Comm'n,* 369 U.S. 482, and *United States* v. *Philadelphia National Bank,* 374 U.S. 321, this Court did emphasize that: "Immunity from the antitrust laws is not lightly implied", 369 U.S. at 485, followed in 374 U.S. at 348. But this is not the principle asserted by the government in this case; nor does it go far enough to accomplish the government's present purpose. Appellees do not ask that an exemption from the antitrust laws be "implied" in their behalf; we say that such exemption is expressly granted.[10] The "principle" which governs the present case, therefore, is that laid down in *McLean Trucking Co.* v. *United States,*

[8] It is instructive that although appellant asserts that its "principle" of construction is "accepted" and "familiar", no square authority is put forward in its support.

[9] The phase of the case adverted to here by the government dealt with the exemption from § 7 of the Clayton Act in favor of "transactions duly consummated pursuant to authority given by * * * the Secretary of Agriculture under any statutory provision vesting such power in such * * * Secretary". This Court rejected defendants' claim to come within this exemption because "there is no 'statutory provision' that vests power in the Secretary of Agriculture to approve a transaction * * * under the circumstances of this case". 362 U.S. at 469-470.

[10] *United States* v. *Philadelphia National Bank, supra,* at 350 n. 27.

321 U.S. 67, 79: "It is not for this Court, or any other to override a policy, or an exemption from one, so clearly and specifically declared by Congress, whatever may be our views of the wisdom of its action".

Since the Webb-Pomerene Act is subject to the same rules of construction as any other Act of Congress, its language, "particularly the central term—'export trade'" (J.S. 9) must be given full effect. This term clearly covers the challenged transactions, exempting them from the antitrust laws.

2. The legislative history of Webb-Pomerene, heavily relied on by appellant, does not enhance the substantiality of its appeal.[11] It is striking that appellant was unable to find a single statement in any document or debate which reflects an intention to give "export trade" any meaning other than the one which its words naturally connote and which was adopted as its definition in Section 1 of the Act itself. Nor has appellant uncovered a single remark suggesting that transactions which qualify under this definition would be excluded from coverage because of financing or other participation by the United States. Finally, appellant's argument that Congress, though loaning considerable sums of money to foreign nations in 1918 when Webb-Pomerene was passed, could not have foreseen "our modern-day foreign aid program" characterized by Korean-type "grants" (J.S. 12), is based on a fundamental misconception about foreign aid. It is true that the Korean procurements were financed by "grants";

[11] While the lower court did carefully review all of the government's arguments, its conclusion was "that the answer lies in the wording of the statute" (J.S. 22). "Much as plaintiff strains at the meaning of the words 'export trade', we are unable to find any ambiguity in them." (J.S. 37).

but the record also shows that U.S. foreign aid has been provided through *both* grants and loans (Stip. 22, 36), and as the court below noted, "Neither the tender nor award documents nor AID regulations make any distinction between the two forms of financing" (J.S. 35 n. 9). Actually, Korean-type "grants" have been the exceptional form of foreign aid, while loans, with which appellant concedes Congress in 1918 was familiar,[12] have been the more typical form of aid since at least 1961.[13]

Moreover, the affirmative indications from the legislative history to which appellant points, actually support coverage here. The objective of the Act "to enable American companies to compete effectively in international markets against foreign combines" (J.S. 9) was well served by appellee companies' ability to operate through the Association.[14] Appellant correctly

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[12] The government takes pains to minimize the significance of the references in the Webb-Pomerene debates to the "extensive loans which the American government was making to certain foreign countries because of the impact of World War I on the economies of those nations * * *". (J.S. 12). We deem these statements to be significant because they demonstrate an awareness that the proposed legislation might affect transactions financed by the public treasury. But we do not pause here to consider the strength of that inference, for our Motion to Affirm rests squarely on the language of the Act.

[13] AID, Operations Report (FY 1967) p. 68.

[14] CPEA's sales efforts for its members were wide-ranging; while this record details only those activities involving sales to Korea, the government stipulated that CPEA competed actively in free world export markets with foreign suppliers of concentrated phosphates, including producers with easy access to some of the world's major deposits of phosphate rock (Stip. 13; 40). The economies derived from CPEA's Korean activities are apparent from the record (Stip. 31-32; 34-36; 38).

points out that many Congressmen were concerned lest competition in domestic markets be adversely affected by the bill and therefore adopted the specific provisos discussed by the government (J.S. 13).[15] But the reasonable inference here is that Congress gave consideration to possible abuses of the exemption, and took action to guard against those which it feared.

3. The stipulated record deals largely with the nature of AID's participation in the challenged transaction. The government argues here that it was the "actual purchaser" (J.S. pp. 14-16). This is clearly wrong. The lower court's contrary finding was based wholly on the facts stipulated by the parties.[16] But the conflict need not be resolved. The court below did not rest its decision on its characterization of the transac-

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[15] The government concedes that appellees' activities were not prohibited by those provisos (J.S. 8 n.5; J.S. 24, 41; Stip. 12). Thus its argument that appellees have "restrained trade within the United States" (J.S. 14) is a rhetorical flourish which uses those words in a sense other than Congress used them in the Act.

[16] The government's concession, in the court below, that AID characterized itself as "essentially a financing institution" and that "AID did not itself procure any concentrated phosphates for Korea" (Stip. 21) is obviously at odds with its statement here that the "United States * * * is indisputably the purchaser of the goods procured and shipped abroad". (J.S. 16). The lower court's finding that "defendants were selling to the Korean Government" (J.S. 34) recognized that CPEA and other sellers conducted extensive commercial activities in Korea; most sales contracts were made there, most contract disputes were settled there, all material was shipped to Korea, and sellers were paid on orders from Korea. AID, as well as CPEA, Korean government agencies and other sellers regarded the Korean procurements as export transactions. (J.S. 28, 34; Stip. 31, 32, 34, 38; Stip. Exs. 18, 24-27). Significantly, most bidders on these Korean procurements regularly bid through export brokers. (Stip. Ex. 47).

tion; more significantly, the inquiry is not called for by the statute. The basic structure of the Act, and particularly the definitions of the key terms, make clear that the frame of reference for "export trade" was meant to be geographic: the location of the market where the goods are shipped and consumed. Under the government's argument, procurements financed by foreign aid might or might not be "export trade" depending on how antitrust officials (not AID, Korea or sellers) might evaluate a loan's repayment terms or a "counterpart" financial obligation, and regardless of whether the terms of foreign assistance were public information. The government's theory would thus introduce a new test of coverage, a test which has no cognizable nexus with the language of the statute, its structure, or its legislative history. If these sources of statutory meaning are henceforth to be disregarded in the interpretation of the Webb-Pomerene Act, exporters will avail themselves of the Act's benefits at the peril of the strict criminal and civil liabilities of the Sherman Act, with no frame of reference whatever to judge the legality of their conduct.

4. The government's case ultimately rests on the claim that it is unfair to subject AID programs to possibly higher prices due to elimination of competition among the members of a Webb-Pomerene association. In the court below, the government conceded that it made no claim that CPEA had charged non-competitive prices on AID-financed sales (T. 32-33, 17-18). On this record, therefore, the assertion that the AID program will suffer is without substance.[17] Such

[17] As the district court observed, AID officials have long known of the participation of Webb-Pomerene associations in AID procurement, and had ample authority to protect the program against

speculative considerations provide no basis for plenary review by this Court of an insubstantial question.

B. The Appeal Is Moot

For the reasons stated, the court below was clearly right in its interpretation of the Webb-Pomerene Act. Changed conditions, however, make this issue entirely academic with respect to these appellees. See Statement, p. 5, *supra*. Under established precedent, these changed circumstances have rendered the case moot; and they have certainly removed any need for equitable relief. The appeal should therefore be disposed of without reaching the merits. "Courts should avoid passing on questions of public law even short of constitutionality that are not immediately pressing." *Eccles* v. *Peoples Bank*, 333 U.S. 426, 432.

In *United States* v. *W. T. Grant Co.*, 345 U.S. 629, this Court enunciated the principles governing dismissal of suits for injunctions against antitrust violations, where the defendant has abandoned the allegedly illegal activities. Such voluntary cessation, the Court held, does not of itself make the case moot. But the Court continued: "The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.' The burden is a heavy one." *Id.* at 633, quoting from

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unreasonable and uncompetitive prices (J.S. 41-42). Contrary to the government's claim of error (J.S. 16-17), the court did not thereby assert that the AID officials were empowered to "supplant the antitrust laws * * *". Rather, the court was rejecting the government's argument, based on claims of necessity, that the antitrust laws must be construed to protect the AID program. Of course, AID programs "are entitled to full protection under the antitrust laws" (J.S. 17); but they are also subject to the exemptions from those laws.

United States v. *Aluminum Co. of America,* 148 F.2d 416, 448.

We believe that the burden is met in this case. If there was a violation (which we deny), it was not willful. On the contrary, CPEA and its members acted with full disclosure to AID and the other government agencies, and when the AID regulation took effect, CPEA's remaining members stopped using CPEA for any sales under the AID program, and dissolved CPEA. Appellant points out that the amended AID regulations do "not in terms apply to the transactions involved here" (J.S. 17, n. 12), but even in their present form, the regulations have made it useless for CPEA to continue operations. Domestic-source procurements now account for substantially all AID-financed phosphate procurements, and, as a practical business matter, it is obviously uneconomical to maintain *both* individual corporate, and joint CPEA, export sales organizations. To be sure, AID could restore its earlier regulations and abandon its prohibition against Webb-Pomerene associations. But this *possibility* does not keep the present case alive. The fact is that appellees have stopped bidding through CPEA on AID-financed sales, and AID's regulation, adopted without the intervention of any court bars them from doing so in the future. In these circumstances dismissal of the action does not "grant defendants * * * a powerful weapon against public law enforcement" (345 U.S. at 632); it merely confines the court to its duty "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills* v. *Green,* 159 U.S. 651, 653.

It is significant that the two resignations and dissolution of CPEA were due not to the institution of the lawsuit, but to the intervening change in AID regulations and business considerations unrelated to this litigation (Statement, p. 5, *supra*). The decisions preserving the jurisdiction of the courts to enjoin future illegal conduct were distinguished on this basis in an early antitrust injunction suit, *United States* v. *Hamburg-American Co.*, 239 U.S. 466, 476-477. "But if the intervening event *is owing to the plaintiff's own act* or to a power beyond the control of either party, the court will stay its hand." *Id.* at 477, quoting from *Mills* v. *Green, supra,* 159 U.S. at 654 (emphasis supplied).

Whatever vitality this case retains for jurisdictional purposes, it is plain that the government does not need the relief sought in the complaint; and its complaint should be dismissed for that reason alone. In *W. T. Grant,* after holding that the case was not moot, the Court said (345 U.S. at 633):

> But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations.

In *Grant* this Court did not make an independent determination whether the announced standards had been met; its decision was based on approval of the

trial court's exercise of equitable discretion. But we doubt that a case could arise in which these standards point more strongly than here in favor of the defendants: we are confident that appellees' good faith will not be challenged. In *Grant* the government's claim that defendants had a proclivity for unlawful conduct was negatived "particularly since it is only recently that the Government has attempted systematic enforcement of § 8 [of the Clayton Act]", 345 U.S. at 634. The present case, of course, is one of first impression under the Webb-Pomerene Act, which is now in its fiftieth year. Appellees' claim that their conduct was lawful is, to say the least, entirely reasonable.[18] In actuality, the government secured the "prospective relief" it sought in the lower court when the AID regulation took effect. Appellant can hardly deny the "effectiveness" of the discontinuance, particularly since CPEA has been dissolved.

Finally, appellees acted in good faith in reliance on a plain statutory exemption and with full disclosure to the government agencies involved. In good faith they halted the challenged activities after vindication in the court below because of an intervening administrative ruling. In an antitrust suit, like any other, "the moving party must satisfy the court that relief is needed", *United States* v. *W. T. Grant Co., supra,* 345 U.S. at 633. There is simply no occasion for the intervention of a court of equity in this case.

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[18] The *Grant* case, of course, does not stand alone in holding that equitable relief may be denied where the defendant has voluntarily abandoned activities which the government sought to enjoin. See, *e.g., Hecht Co.* v. *Bowles,* 321 U.S. 321, 329; *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 325 U.S. 419, 421; *United States* v. *Oregon Medical Society,* 343 U.S. 326, 334.

It is unnecessary to state precisely the difference between mootness and the lack of a basis for granting relief or issuing an injunction. Whichever rubric best fits the present appeal, the court should not set the case for argument. U.S. Sup. Ct. Rule 16 (1)(d).[19]

CONCLUSION

For the reasons set forth above, the judgment below should be affirmed, or this appeal dismissed.

Respectfully submitted,

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March 15, 1968

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[19] Under these circumstances, it would be appropriate for this Court to dismiss this appeal with directions to vacate the judgment below. This was the substance of the relief sought by the parties after the government had filed its Notice of Appeal (*supra*, n.4).

APPENDIX A

CERTIFICATE AND AGREEMENT REGARDING CONCERTED PRICING (A.I.D. Form 285)

In consideration of the receipt of funds made available by the United States under the Foreign Assistance Act of 1961, as amended, in payment, in whole or in part, of the sum indicated on the accompanying invoice as claimed to be due and owing, the undersigned, acting on behalf of the firm whose name appears on line 6 below (the supplier or the producer of the commodities) and authorized to bind such firm, agrees with and certifies to the Agency for International Development (A.I.D.) as follows:

(1) The firm whose name appears on line 6 below--

☐ (a) Is the A.I.D.-financed supplier, but is not the producer of the goods described by the goods described by the attached invoice which the supplier has executed.

☐ (b) Is the A.I.D.-financed supplier and is also the producer of the goods described by the attached invoice which the supplier has executed.

☐ (c) Is not the A.I.D.-financed supplier, but is the producer of the goods described by the attached invoice which the producer has executed.

[Check the appropriate box above]

(2) The price and quantity terms of the sale described by the attached invoice have been arrived at independently by the firm on whose behalf this Certificate is executed, without consultation or agreement concerning such price or quantity with any other bidder, offeror, competitor, or any member of an Export Trade Association (an Association within the meaning of 15 U.S.C. §§61-65), and without reliance upon any price established or recommended by any such Association.

(3) If the undersigned has checked box (1)(a) of this Certificate, he has also appended an invoice executed by the producer of the commodities described in the supplier's invoice and a Certificate and Agreement Regarding Concerted Pricing (A.I.D. Form 285) executed by the producer of such commodities.

(4) Invoice No. _____

(5) A.I.D. No. _____

(6) Name of firm _____

(7) Name of undersigned and position in firm _____

_____

(8) Signature _____ (9) Date: _____

INSTRUCTIONS: *"Firm" means the supplier or producer on whose behalf this Certificate and Agreement Regarding Concerted Pricing is executed. The supplier of the commodity shall execute this Certificate in every case in which he is required to do so as a condition for receiving payment. If the supplier indicates in box (1)(a) that he is not also the producer of the commodities (through manufacture, processing, mining, growth, or assembly), he shall attach to his invoice the invoice of the producer (covering the same commodities as described in the supplier's invoice) and an additional Certificate and Agreement Regarding Concerted Pricing (A.I.D. Form 285) executed by the producer of the commodities. On line 4, the supplier or the producer shall insert the serial number or other number which he has assigned to his invoice. On line 5 the supplier or the producer shall insert the A.I.D. implementation number which identifies the transaction.*

APPENDIX B

State of Delaware

Office of Secretary of State

Certificate of Dissolution

To All To Whom These Presents May Come, Greeting:

WHEREAS, It appears to my satisfaction by a duly authenticated certificate certifying that the dissolution of CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC. a Delaware corporation whose principal office is located at The Prentice-Hall Corporation System, Inc., No. 229 South State Street of the City of Do has been authorized in accordance with the provisions of Section 275 of the General Corporation Law of Delaware, (Chapter 1, Title 8, Delaware Code), as amended, which certificate has been executed, sealed and acknowledged in accordance with the provisions of said Section 275,

Now, therefore, I, ELISHA C. DUKES Secretary of State of the State of Delaware, do hereby certify that the said corporation did on the twenty-eighth day of December, 1967, file in this office a Certificate of Dissolution, duly executed, sealed and acknowledged, which certificate is now on file in my office as provided by law.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal, at Dover this twenty-eighth day of December, 1967

Elisha C. Dukes

Secretary of State

Assistant Secretary of State

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1102

UNITED STATES OF AMERICA, APPELLANT

v.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM OR DISMISS

While the government's position on the merits is adequately set forth in our jurisdictional statement, we think it desirable to reply to appellees' assertion that the case is moot.

Appellees' suggestion of mootness (Motion, pp. 13–17) is based upon the fact that on January 1, 1967—some eight months before the district court's decision was announced—an AID regulation (22 C.F.R. 201.52(a)(7) (1967 Rev.)) became effective which precludes Webb-Pomerene associations from bidding on "U.S.-source only" procurements, *i.e.*, those on which the material cannot be supplied from foreign sources.

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Appellees also point out (Motion, pp. 4, 20) that on December 28, 1967, they dissolved the Concentrated Phosphate Export Association.

It was stipulated, however, that the procurements involved in this case were not restricted to "U.S. source only." Moreover, although the great bulk of recent AID procurements of fertilizer have in fact been from domestic sources (AID Operations Report (1967), p. 74)—as were the procurements in this case—this is not the same as "U.S.-source only" procurement. Not all procurements have been so restricted nor can it be assumed that they will be.[1] Thus, the members of the dissolved association, which were individually named as defendants, may resume concerted Webb-Pomerene bidding on all procurements not limited to U.S. sources whenever they deem it profitable to do so.

On these facts, a live controversy—whether the Webb-Pomerene exemption applies to government procurement activities—continues to exist between the government and appellees. If this Court notes probable jurisdiction and reverses on the merits, the government would be entitled to relief designed to preclude appellees from resuming Webb-Pomerene bidding on government procurements. The case is therefore not moot.[2]

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[1] In addition, AID's recent regulation remains subject to modification. AID may take such action in response to the urging of groups such as appellees, who could rely on the district court's decision that the Webb-Pomerene exemption applies to foreign aid procurement. Such groups also might institute an action challenging the validity of the regulation, relying at least in part on the holding of the district court.

[2] Appellees' statement (Motion, p. 4, n. 4) that the district judge declined to vacate his judgment "[f]or procedural rea-

Appellees' reliance upon *United States* v. *W. T. Grant Co.*, 345 U.S. 629, is misplaced. In *Grant*, after the government filed suits challenging interlocking directorates under Section 8 of the Clayton Act, the interlocks were terminated; the district court, without deciding the merits, dismissed the suits on the ground there was no likelihood of future violation by the defendants. This Court, although holding that the case was not moot (*id.* at 632–633), affirmed on the ground that the district court had not abused its discretion in concluding that there was no "cognizable danger of recurrent violations" (*id.* at 633). The present case is the exact opposite of *Grant*: here the district court decided there was no violation, and thus did not consider the need for relief. Thus, the district court here never exercised any discretion in determining whether relief was necessary and, as we have shown, the government would be entitled to relief if this Court agrees with us on the merits.

More in point is *United States* v. *Freight Association*, 166 U.S. 290. In that case the government charged an association of railroad companies with violating the Sherman Act by fixing rates, allocating business and acting in concert to meet outside competition. The complaint sought dissolution of the association and an injunction against further concerted activity. After a hearing on the merits, the suit was dismissed. Nevertheless, the association dissolved and announced that it was terminating all concerted

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sons" is inaccurate. He advised the parties that he did not regard the jointly proposed order favorably since it was his view that he had decided a substantial question that warranted resolution on the merits.

activity. This Court rejected the defendants' contention that the government's appeal should be dismissed because the association had been dissolved. Noting that the defendants could easily form another association, the Court held that "the appellate jurisdiction of this court is not ousted by a simple dissolution of the association, effected subsequently to the entry of judgment in the suit" (166 U.S. at 309.). See also *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 43; *Walling* v. *Reuter*, 321 U.S. 671, 673–674; *Federal Trade Commission* v. *Goodyear Co.*, 304 U.S. 257, 260.[3]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1968.

[3] If, however, the Court should conclude that the case is moot, we suggest that it follow its usual practice by vacating the judgment below and remanding with instructions to dismiss the complaint as moot. *United States* v. *Munsingwear*, 340 U.S. 36, 39. Compare Motion, p. 17, n. 19.

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In the Supreme Court of the United States

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No. 1102

UNITED STATES OF AMERICA, APPELLANT,

v.

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (App. 346-365) is reported at 273 F. Supp. 263.

JURISDICTION

The order of the district court was entered on September 11, 1967. The United States filed its notice of appeal on November 9, 1967. Probable jurisdiction was noted on April 1, 1968 (App. 367). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29; *Brown Shoe Co. v. United States*, 370 U.S. 294; *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316.

QUESTION PRESENTED

Whether export trade associations engaged in selling goods procured under the government's foreign aid program are exempted from the antitrust laws by the Webb-Pomerene Act.

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *.

Section 1 of the Webb-Pomerene Act, 40 Stat. 516, 15 U.S.C. 61, provides in pertinent part:

> The words "export trade" * * * mean solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but the words "export trade" shall not be deemed to include the production, manufacture, or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale.
>
> The words "trade within the United States" wherever used in this Act mean trade or commerce among the several States or in any Territory of the United States, or in the District of Columbia, or between any such Territory and another; or between any such Territory or Ter-

ritories and any State or States or the District of Columbia, or between the District of Columbia and any State or States.

Section 2 of the Webb-Pomerene Act, 15 U.S.C. 62, provides:

> Nothing contained in [the Sherman Act] shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: *And provided further*, that such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association or which substantially lessens competition within the United States or otherwise restrains trade therein.

STATEMENT

This is an appeal by the United States from the district court's dismissal of its civil antitrust suit arising out of shipments of fertilizer to the Republic of Korea under the United States' foreign aid program by a group of companies acting in concert through an export association.

308-915—68——2

I. THE FOREIGN AID PROGRAM

Since World War II, the United States has furnished economic assistance to other countries. Initially this program was aimed at aiding the war-torn nations of the world; in more recent years it has been directed toward "aiding peoples of less developed friendly countries of the world to develop their resources and improve their living standards." § 102, Foreign Assistance Act of 1961, 75 Stat. 424, as amended, 22 U.S.C. 2151.[1]

Foreign assistance consists of a number of distinct programs, each governed by its statutory requirements. The present case involves grants for technical cooperation and development, which are financed by funds appropriated annually by Congress on the basis of budget requests and recommendations by the Department of State and the Agency for International Development (AID).[2] See, *e.g.*, 81 Stat. 936; 80 Stat. 1018; 78 Stat. 1015.

AID makes funds available to recipient nations in the form of loans or grants, depending on the type of program, its statutory authorization, AID regulations

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[1] See, *e.g.*, the Foreign Aid Act of 1947, 61 Stat. 934; the Foreign Assistance Act of 1948, 62 Stat. 137; the Foreign Economic Assistance Act of 1950, 64 Stat. 198; and the Mutual Security Act of 1954, 68 Stat. 832, which remained in force until passage of the present law, Foreign Assistance Act of 1961, 75 Stat. 424, as amended, 22 U.S.C. 2151.

[2] AID, a semi-autonomous agency within the Department of State (22 U.S.C. 2396(a)), was established by the Secretary of State on September 30, 1961, as successor to the International Cooperation Administration which had administered foreign assistance under the Mutual Security Act of 1954 (Exec. Order No. 10610, 20 F.R. 3179).

and the terms of bilateral agreements between the United States and the recipient nations. The United States reserves comprehensive control over use of the funds through statute (22 U.S.C. 2161–2213), regulation (AID Regulation No. 1, 22 C.F.R. Part 201, App. 173–188) and the terms of the bilateral agreements (see App. 47, 110–112).

Since December 1953 the United States has had bilateral agreements with the Republic of Korea for economic, technical and related assistance (App. 46–47, 90–97). This case involves assistance grants to Korea under the agreement dated February 8, 1961 (App. 46–47, 77–89).

2. THE DEFENDANTS

In 1961, the Concentrated Phosphate Export Association ("the Association"), composed of firms engaged in the domestic production of concentrated phosphatic materials, was organized as a non-profit corporation, for the purpose of enabling its members to act as a group in the overseas sale of phosphate used in the production of fertilizer.* It registered with the Federal Trade Commission as an "association which engages solely in export trade" under Sec-

*In 1961, the Association's membership consisted of W. R. Grace & Company, Tennessee Corporation, and American Cyanamid Company. Two other corporations, which were members at the time this case originally went to trial, later withdrew from the Association. International Minerals & Chemical Corporation terminated its membership on June 30, 1966. Socony Mobil Company, Inc., now known as Mobil Oil Company, withdrew from membership effective March 15, 1967. Appellees advise that the Association was dissolved on December 28, 1967 (Appellees' Motion to Affirm or Dismiss, pp. 5, 20).

tion 5 of the Webb-Pomerene Act (40 Stat. 517, 15 U.S.C. 65). Under its by-laws, the Association was controlled by a Board of Directors, each director representing a member firm (App. 45; Ex. 4, p. 62). The Board determined the price at which its members would sell concentrated phosphate to the Association and the minimum price at which these materials would be sold by the Association abroad. It also allocated available business among its members under procedures set forth in the membership agreements (App. 45; Ex. 2, pp. 46-46-A; App. 71-74).

3. THE TRANSACTIONS INVOLVED

Between September 1961 and April 1966, the Association furnished more than 800,000 tons of concentrated phosphate to the Korean Government (see App. 327-340), for which it received $48.1 million, or approximately 52.5 percent of its total sales of $83.4 million for this period (see App. 54). Eleven of these transactions, the subject of the instant suit, were arranged and financed by AID under the Foreign Aid Program (App. 50). The Association's AID-financed deliveries to Korea totaled $43.7 million (App. 54). On none of these transactions could the Association members bid individually—the Association was their exclusive outlet for overseas deliveries (App. 70-71). In each instance a single bid was agreed upon by all

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"Ex." refers to stipulated exhibits included in the record in the district court, on file in this Court, but not printed in the Appendix.

The other two shipments, valued at $4.3 million, were financed with the Korean foreign exchange funds and a special stabilization fund unrelated to the Foreign Aid Program (App. 50-51).

members and submitted in their behalf by the Association.

Two basic methods of procurement are used by AID in furnishing goods to foreign governments: (1) procurement through a U.S. government agency; and (2) procurement through an agency of the recipient nation. Both methods were used in the transactions involved here. In two of the procurements a United States government agency, the General Services Administration (GSA), acquired the phosphates in the name of the United States and thereafter transferred them to Korea. In nine others the invitations to bid were issued by an agency of the Korean government, under procedures specified and controlled by AID.

The GSA procurements were conducted as follows. After the Korean government had requested AID to authorize procurement of the phosphates (App. 293), AID designated GSA as the procurement agency (App. 296). GSA issued an invitation to bid on a standard government form (App. 303) which informed prospective bidders of the identity of the recipient country and of any limitations on the geographic source from which the material might be supplied. After bids were received and reviewed by GSA personnel, the agency decided which bid was "most advantageous to the Government, price and other factors considered" (App. 304). The bid was accepted in the name of the United States (see Ex. 36, p. 350); and the phosphates were delivered to the United States, which then shipped them to Korea. The Association's invoices for payment were submitted directly to GSA (Ex. 38, p. 369), which paid both the total price plus the freight costs out of funds allocated by

AID at the time it issued the procurement authorization (App. 48–49). The GSA procurements from the Association in this case totaled approximately $8 million (App. 334).

The nine other procurements, whose total cost was approximately $35.7 million (App. 54), were effected through the Office of Supply, Republic of Korea (OSROK) which had been authorized by AID to arrange procurements to be paid for by the United States. AID issued a procurement authorization to OSROK which permitted it to issue invitations for bids on specified amounts of phosphates under AID's program. Each phase of the transaction was subject to strict regulation and control by AID (*e.g.*, App. 189–210; Ex. 14–16, pp. 211–221); indeed, OSROK's invitation for bids incorporated AID Regulation No. 1 (see App. 211) which governs all AID-financed procurement. Under AID's procurement authorization, a United States bank to which had been issued an AID letter of commitment was designated to make payment to the successful bidder against the appropriate shipping documents. OSROK invited bids, prepared an abstract of bids received (Ex. 19, pp. 245–250) and awarded the contracts on the basis of the lowest F.O.B. costs (App. 213). It reported all of this information to AID (Ex. 20–23, pp. 252–262). The successful bidder then arranged for the delivery of the phosphates at the designated Korean port and received payment from the United States bank designated by the AID letter of commitment. The bank was then reimbursed by the Treasury out of funds appropriated to AID (App. 265–281).

Under either method of procurement, the United

States paid the entire cost of the phosphates furnished to Korea.* AID's approval and issuance of a procurement authorization were necessary to initiate the process in each case and, regardless of the method of procurement, AID determined every significant detail of the entire transaction. AID Regulation No. 1, 22 C.F.R. Part 201 (App. Ex. 10).

4. THE AID PROCUREMENT REGULATION

AID Regulation No. 1 (22 C.F.R. Part 201) (App. 173–188), which became effective November 1, 1964, as a successor to a similar regulation issued by its predecessor agency, ICA (App. 141–172), comprehensively sets forth the conditions and procedures applicable to AID-financed procurement. Before authorizing procurement of a commodity requested by a foreign government, AID is required to determine whether the proposed purchase is in accordance with the objectives of the Foreign Assistance Act (App. 48, 111). AID specifies the commodity and the maximum amount of money which is to be provided, delivery periods, the source of supply, and any other conditions it deems necessary (22 C.F.R. 201.11) (App. 175).

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* When the concentrated phosphate procured with AID funds is resold by the Korean Government to private purchasers within Korea, the funds generated thereby are deposited in the Bank of Korea and are subject to a "counterpart fund" arrangement (App. 49, 353). Under this arrangement, these funds are available to both the United States and Korea, to be used for mutually agreed purposes such as supporting American and Korean defense establishments, Korean public works programs, etc. (*Ibid.*). However, Korea is under no obligation to repay the AID funds (App. 49, 353, cf. 358).

Re-export of the commodity by the foreign country is prohibited unless specifically authorized by AID, and failure to comply with this requirement obligates the recipient country to refund the amount paid by AID (22 C.F.R. 201.42) (App. 179). Similarly, AID may require a refund from the recipient country whenever the transaction violates the requirements of AID's regulations or any United States statute (22 C.F.R. 201.81) (App. 186).

AID determines the maximum price range (22 C.F.R. 201.60-201.69) (App. 182-185), and also requires that commodities be purchased at prices not in excess of the market price prevailing in the United States, as adjusted for differences in cost, transportation, destination, quality and terms of payment (22 C.F.R. 201.60, 201.63) (App. 182, 183). AID may authorize the procurement of the commodity to be made by a United States government agency, *e.g.*, the General Services Administration (22 C.F.R. 201.86) (App. 186). Finally, it may divert the shipment at any time before delivery and require that the title to AID-financed commodities in transit vest in AID "if in the opinion of A.I.D. such action is necessary to assure compliance with the provisions or purposes of any act of Congress" (22 C.F.R. 201.44) (App. 179).

Before payment is made, each supplier must file with AID a Supplier's Certificate (22 C.F.R. 201.52 (a)(6)) (App. 182), by which he affirmatively warrants compliance with the series of regulations pertaining to price and manner of bidding and agrees to make the appropriate refund to AID upon demand,

in the event of non-performance under his contract, for any breach of the certificate or for any false certification.

5. THE DECISION OF THE DISTRICT COURT

On December 21, 1964, the United States filed a complaint against the Association and its member firms charging that their activities in selling concentrated phosphate to Korea under the AID program constituted illegal price fixing and allocation of business, in violation of Section 1 of the Sherman Act. The government sought (a) an injunction against further concerted activity by the defendant firms in connection with foreign aid and all other transactions; (b) dissolution of the Association; and (c) a prohibition against its members' reestablishing the Association for ten years thereafter. During the proceedings the government abandoned its request for dissolution.

The case was submitted to the district court on the stipulated facts summarized above. On September 11, 1967, the court dismissed the complaint, holding that the Association's acts in connection with the Korean transactions were exempted from the antitrust laws by the Webb-Pomerene Act. The court agreed with the government that the United States, through AID, "initiated, directed, controlled and financed" the transactions (App. 358), but it concluded that the sales, whether handled through an agency of the Korean Government or through GSA, were actually made to the Korean Government as purchaser. It based this conclusion on the fact that the commodity

was specifically procured for shipment to Korea; on the "raison d'être" of the foreign aid program; on the counterpart fund arrangement with Korea; and on the fact that after shipment, the risk of loss is on Korea (App. 358–359). Since the sales were not for domestic resale or consumption, and were made to a foreign purchaser, the court determined that they constituted "export trade" within the literal meaning of the Webb-Pomerene Act (App. 359).

The district court rejected the government's argument that the Webb-Pomerene Act, as an exception to the antitrust laws, should be construed narrowly to apply only to the kind of transactions specifically contemplated by Congress, particularly where its application would result in disadvantage to the United States through concerted activities. It conceded the unfairness of depriving the government, which pays for the shipments, and ultimately the American taxpayer, of the benefits of competitive bidding, but it found that there was no ambiguity in the statute's definition of "export trade." It noted that Congress had carefully limited the provisions of the Webb-Pomerene Act so as to prevent any injury to domestic competition and any effect on domestic prices, but pointed out that no such injury or effect was charged in the instant case (App. 362–363).[1] As to the govern-

[1] See n. 6, *supra*, p. 9.

[2] The government did not allege that the Association's activities were "in restraint of the export trade of any domestic competitor of such association" or that its conduct "artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association * * *" (15 U.S.C. 62).

ment's claim that bidding by Webb-Pomerene associations burdens and frustrates the foreign aid program, the court held that the Association's activity was fully known to AID when it accepted the bids, and that AID has adequate regulatory power to protect its procurement activities from unreasonable prices (App. 364-365).

INTRODUCTION AND SUMMARY OF ARGUMENT

In holding that foreign aid selling practices by an export trade association made up of companies which otherwise compete are exempt from the antitrust laws under the Webb-Pomerene Act, the district court reached a result that in its own words "seems obviously unfair to the United States * * *" (App. 362). For it has construed the Webb-Pomerene Act's limited exception to the antitrust laws so as, again in its own words, "to permit the defendants to charge an artificially set price and deprive the Government of price benefits which might come from competitive trade conditions within the United States" (*ibid.*).

Such a result disregards the narrow purposes of the Webb-Pomerene Act as disclosed by its legislative history—to enable American exporters to cope with cartelized foreign competition in foreign markets without causing any adverse effects on the economy of the United States. Within this narrow frame the Act operates in derogation of the Sherman Act's clear prohibition against concerted price fixing. Under familiar principles of construction designed to preserve the national policy in favor of competition, therefore, the Webb-Pomerene Act must be closely confined within the scope

of its intended purpose. That purpose does not embrace the comprehensive foreign aid program which the United States maintains in today's uncertain international economy. To deprive the United States of the benefits of competition on foreign aid procurement which it "initiate[s], direct[s], control[s] and finance[s]" (App. 358), on the grounds that the transactions are "export trade" and that the recipient nation is the "purchaser", is to covert an antitrust exemption designed for other purposes into an unjustified burden on limited foreign aid funds. Moreover, the district court's reading of the statute is inconsistent with the long-established congressional policy favoring competition in government procurement. Finally, the impact of the antitrust laws here cannot be avoided by assuming, as did the court below, that AID's discretionary powers over procurement matters are a substitute for the role of the antitrust laws in guaranteeing competitive pricing in the foreign aid program. Whatever its procurement powers, AID has not been designated by Congress to enforce the antitrust laws: that is a matter for the Department of Justice, the Federal Trade Commission and the courts.

ARGUMENT

I. THE HISTORY, LANGUAGE AND PURPOSE OF THE WEBB-POMERENE ACT SHOW THAT IT DOES NOT EXEMPT FROM THE ANTITRUST LAWS FOREIGN AID PROCUREMENT INITIATED, CONTROLLED AND FINANCED BY THE UNITED STATES

The general language of the operative provision of the Webb-Pomerene Act, conferring immunity from the Sherman Act for acts done by an association "in the course of export trade," itself throws little light on the

problem before the Court—whether this immunity extends to goods sold to the United States for export under the foreign aid program. When this language is viewed, however, in the light of (1) the Congressional purpose in providing the immunity, (2) the other provisions and general design of the Act, and (3) the long established Congressional policy favoring competition in government procurement, we submit that the Webb-Pomerene antitrust immunity for "export trade" does not cover foreign aid transactions.

A. The legislative history of the Webb-Pomerene Act demonstrates the narrow Congressional purpose in creating the Act's limited exception to the antitrust laws. The statute, which is a complete departure from the general principles of the antitrust laws, was passed to enable American companies to compete effectively in international markets against foreign combines, and to offset the collective power of the foreign purchasing cartels prevalent when World War I began.

The initial impetus for the legislation came from a 1916 report of the Federal Trade Commission on cooperation in American export trade (see 55 Cong. Rec. 3576–3577). That report pointed to competitive disadvantages suffered by American exporters because our antitrust laws were thought to prevent them from undertaking joint selling arrangements in foreign markets. But the Commission's report emphasized that "[t]o allow American firms to cooperate for export and to permit the use of certain methods abroad which are legal in foreign countries but are not permitted in the United States in no way implies that such cooperating firms will be allowed, through their activities in export trade, to bring about results in

this country which could not otherwise be legally secured."[9]

This view was reiterated by the legislation's sponsors (*e.g.*, 55 Cong. Rec. 3580, remarks of Congressman Webb; 56 Cong. Rec. 170, 172, remarks of Senator Pomerene) during the debates on the proposal in the 64th and 65th Congresses,[10] and in the

[9] Report of the Federal Trade Commission on Cooperation in American Export Trade, p. 876 (1916). See H. Doc. No. 1485, 64th Cong., 2d Sess. pp. 19–22, 34–36.

[10] Following the Federal Trade Commission's report in 1916, bills to implement its recommendations were introduced in Congress. H.R. 16707, 64th Cong., 1st Sess.; S. 6865, 64th Cong., 1st Sess.; H.R. 17350, 64th Cong., 1st and 2d Sess. After hearings (Hearings before the House Committee on the Judiciary on H.R. 17350, 64th Cong., 1st Sess.), H.R. 17350 was favorably reported in the House without amendment (H. Rep. No. 1118, 64th Cong., 1st Sess.). The debates in the House (53 Cong. Rec. 13532–13540, 13676–13732) were principally concerned with the necessity of protecting small American exporters from the concerted buying and selling power of foreign cartels. The expressed object of the bill was the promotion of export trade, and this view prevailed over the objections of those who feared the bill would effect a repeal of a significant portion of the Sherman Act. The bill, as amended, passed the House on September 2, 1916 (53 Cong. Rec. 13732).

After further hearings in the Senate (Hearings before the Senate Committee on Interstate Commerce on H.R. 17350, 64th Cong., 2d Sess.), the bill was favorably reported with amendments (S. Rep. No. 1058, 64th Cong., 2d Sess.), but was not acted upon in that chamber.

The bill passed by the House was reintroduced in the next Congress as H.R. 2316, 65th Cong., 1st Sess. After it was amended in committee (H. Rep. No. 50, 65th Cong., 1st Sess.), it was debated on the House floor (55 Cong. Rec. 3563–3584) and passed by the House (55 Cong. Rec. 3584–3585). It was then reported to the Senate with further amendments (S. Rep. No. 109, 65th Cong., 1st Sess.), debated (55 Cong. Rec. 7324–7328, 7515; 56 Cong. Rec. 68–75, 107–112, 116–127, 168–186) and passed by that chamber (56 Cong. Rec. 186). In confer-

Committee reports.[11] The primary theme in the Congressional debates was that export trade was a matter of competition between nations, and that Congress wished to put American exporters in a position to capture as much trade as possible for the United States but without in any way burdening the people or the economy of this country. Thus, the sponsor of the bill in the House stated that he was "willing that there should be a combination between anybody or anything for the purpose of capturing the trade of the world, if they do not punish the people of the United States in doing it." 55 Cong. Rec. 3580. See, also, 55 Cong. Rec. 3701. This raison d'être of the Webb-Pomerene Act has no applicability to transactions which are paid for by the United States and thus cannot result in a net transfer of wealth to this country.

In the 65th Congress the proposed legislation was

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ence, further provisions were added to ensure that the activities of these associations would not lessen competition in domestic trade (see H. Conf. Rep. No. 468, 65th Cong., 2d Sess.). Both houses accepted the conference bill (56 Cong. Rec. 4698 (Senate), 56 Cong. Rec. 4722 (House)), and it was approved on April 10, 1918 (56 Cong. Rec. 4999).

[11] S. Rep. No. 109, 65th Cong., 1st Sess., p. 2, adopting S. Rep. No. 1056, 64th Cong., 2d Sess., stated: "[W]hile the purpose of these [export trade] associations is to improve and extend our foreign trade, their business ought to be so conducted as to harmonize with the requirements of our laws respecting domestic trade and without injuring any domestic competitor in the foreign trade or unduly thereby enhancing prices to domestic consumers." Similarly, H. Rep. No. 50, 65th Cong., 1st Sess., p. 3, adopting H. Rep. No. 1118, 64th Cong., 1st Sess., stated: "The bill does not authorize any violation of the present antitrust laws. * * * [It] prohibits the slightest violation of our antitrust laws within the United States, but makes it clear that American exporters doing business in foreign countries are to be allowed to do business in those foreign countries according to the foreign laws."

criticised principally on three grounds: (1) that it was contrary to the spirit of the Sherman Act; (2) that it could hamper efforts to prevent restraints on domestic markets; and (3) that it might result in monopolization of export trade (*e.g.*, 56 Cong. Rec. 175, 4723). Opponents were expressly assured, however, that the bill did not repeal the antitrust laws but merely modified them in a carefully restricted way (56 Con. Rec. 172, 173). The sponsors also repeatedly emphasized that the bill contained ample safeguards to protect the domestic economy and that its ultimate effect would be to promote American trade abroad and provide a powerful boost to the postwar economy. Indeed, further provisions were added in conference to assure this result (see n. 10, pp. 16–17 *supra*, H. Conf. Rep. No. 468, 65th Cong., 2d Sess.

It is true that reference was made during the congressional debates to the existence of extensive loans which the American government was making to certain foreign countries because of the impact of World War I on the economies of those nations, and to the probability that the purchasing power represented by these loans might be reduced somewhat by the proposed statute (see 55 Cong. Rec. 2789, remarks of Congressmen Kenyon and McCumber). But those were loans for which repayment from the various foreign governments was expected, not grants of the kind which have characterized the modern-day foreign aid program and which are involved in the instant case. It was the foreign countries that bore the burden, not the United States.

There is no indication in the legislative history that

American taxpayers would in effect be required to subsidize the anticompetitive conduct that the Act would authorize. What Congress foresaw was that when World War I ended the commercial struggle for foreign sales which had been carried on through private trade channels would be resumed. Its essential purpose was to strengthen the hand of American exporters in that struggle (see 56 Cong. Rec. 108, remarks of Senator Kellogg), but only so long as and to the extent that no adverse effects on the American economy resulted. Congress thus cannot properly be regarded as having envisaged and sanctioned transactions such as are involved here under the modern foreign aid program, carried out at the ultimate expense of the American taxpayer.

B. The Webb-Pomerene Act is an exception to the antitrust laws and it is a familiar principle that such exceptions are narrowly construed, even where a literal reading of the statute might lead to a broader exemption. See, *e.g.*, *California* v. *Federal Power Commission*, 369 U.S. 482, 485; *Milk Producers Association* v. *United States*, 362 U.S. 458, 469-470; *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357; *United States* v. *Borden Co.*, 308 U.S. 188, 198-202; cf. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 335-349. Accordingly, the language of the statute must be confined to its specific underlying purpose. That purpose did not include transactions in which the economic impact of the anticompetitive activity authorized was borne by the economy of the United States.

Indeed, the consistent pattern of Congressional policy with respect to federal procurement, both before and after the enactment of Webb-Pomerene, has been to maximize the extent to which the government will bene-

fit from the normal play of competitive forces in making its expenditures. Competitive bidding was the favored method of procurement during the Civil War under the requirements of the Act of March 2, 1861, 12 Stat. 220. This requirement was continued in the Revised Statutes (R.S. 3709), which provision was in effect when Webb-Pomerene was enacted and remains in effect as amended (41 U.S.C. 5). When "immediate delivery" was "required by the public exigency," R.S. 3709 permittted procurement "by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold * * * between individuals." But even this exception to the requirement of competitive bidding suggests that Congress contemplated that federal expenditures would be made in the context of the normal play of competitive forces in the market place.

Competitive bidding remains today the favored method of federal procurement specified in both the Federal Property and Administrative Services Act (41 U.S.C. 252(c)) and the Armed Services Procurement Act (10 U.S.C. 2304(a)). Under the terms of the latter, "proposals shall be solicited from the maximum number of qualified sources" even when the procurement is by negotiation (10 U.S.C. 2304(g)). As this Court has recognized, in general "the federal procurement policy demands competition * * *" *Paul* v. *United States*, 371 U.S. 245, 253. See, also, Comp. Gen. Dec. B 159868, November 7, 1967, 47 Comp. Gen. 223.

Against this background, the courts should be reluctant to conclude that the Webb-Pomerene Act departs from the pervasive Congressional policy of assuring that the public treasury will be afforded the benefits of

competition. Since Congress was not focusing upon government expenditure policies when it enacted Webb-Pomerene,[11] it is especially fitting to inquire whether the language of the statute is not susceptible of a construction which would harmonize it with the expenditure policies that Congress has elsewhere adopted—and particularly since exceptions to the antitrust laws are construed narrowly.

The district court, however, refused to look beyond the face of the Webb-Pomerene Act's definition of "export trade" in deciding that the Act's exemption from the antitrust laws extends to the foreign aid program.

The only definition of the term "export trade" in the statute appears in Section 1. That Section states that "export trade" means "solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States * * * to any foreign nation * * *" (15 U.S.C. 61). The district court adopted an expansive construction of the term, which creates an unqualified exemption from the antitrust laws for the appellees' concerted activities. In its view "export trade" means simply "to export", *i.e.*, "to carry or send abroad, especially to foreign countries" (App. 360), apparently without regard to the circumstances of the transaction or the legislative context of the term.

This is not, however, a necessary construction. Rather, the statute's emphasis on the phrase "trade or

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[11] When Congress has wished to favor American sellers in the context of government procurement, it has done so directly without creating any immunity from the antitrust laws and thus without depriving the government of the benefits of domestic competition. See the "Buy American Act", 41 U.S.C. 10a–10c, which requires procurement from American sellers under specified circumstances not applicable here.

commerce" would appear to indicate that Congress intended to refer only to export in the ordinary course of commerce, an interpretation which would not embrace foreign assistance by the government. This narrow reading of the antitrust exemption is appropriate against the background of legislative procurement policy favoring competition.

Even if it is assumed that "export trade", on its face, appears to include foreign aid transactions, it is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Holy Trinity Church* v. *United States*, 143 U.S. 457, 459. "[E]ven when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 543–544. See also, *Cabell* v. *Markham*, 148 F. 2d 737, 739 (C.A. 2), affirmed, 326 U.S. 404. Indeed, one of the sponsors of the exemption involved here, Senator Pomerene, stated on the floor of the Senate that he expected his bill to be analyzed as a whole by the courts (56 Cong. Rec. 172). When this is done, the narrow scope of the exemption Congress created becomes clear; it is confined to concerted activity whose effect is exclusively in foreign markets and upon goods sold abroad, not

to transactions where the basis sale is in the United States, and, in sum and substance, to the United States.

The language of the statute confirms this view. Congress wrote into the Webb-Pomerene Act strict limitations to ensure that the associations created would not restrain domestic trade. Thus, Section 1, which provides that "[t]he words 'export trade' . . . mean solely trade or commerce in goods . . . exported, or in the course of being exported from the United States . . . to any foreign nation . . . ," is qualified by a negative proviso excluding sales for domestic resale or consumption. Section 2 further limits the antitrust exemption: "Nothing contained in [the Sherman Act] shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade . . . or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States . . . ." That section further leaves without the scope of the exemption, and thus within the ambit of the antitrust laws, any agreement, understanding, conspiracy or act which artificially enhances or depresses prices within the United States, "or which substantially lessens competition within the United States or otherwise restrains trade therein." In short, "the wording of the statute," which the court below found conclusive (App. 349, 360-361), confirms that Congress intended to accomplish only a narrowly confined objective. Its purpose was to exempt from the antitrust laws only those concerted activities in foreign

trade which would not deny the benefits of competition to the domestic economy.

In sum, the policy reflected by the statutory language, by the Federal Trade Commission's report, by the committee reports, by the congressional debates and by the statutory background indicates that the legislation was narrowly directed to a limited class of transactions which would not directly affect the American economy in an adverse way. Since, as the court below recognized (App. 355–358), the full cost and responsibility for foreign aid procurement is assumed by the United States government, the concerted price-fixing and business allocation practices of the appellee companies through the Association have denied the government and its taxpayers the benefits of competition for the goods procured."

C. The limited Webb-Pomerene exemption cannot properly be extended to the foreign aid program by simply holding, as did the court below, that under that program the "purchaser" is the recipient nation, not the United States. The application of the antitrust laws is determined not by the form of the transactions involved but by their economic consequences. Concepts of private contract law must give way before federal antitrust policy. *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 18; *United States* v. *Masonite Corp.*, 316 U.S. 265, 276–277. Moreover, the district court's holding that Korea is the "purchaser" of the eleven phosphate shipments in-

---

[11] Not only are these practices inconsistent with the limited purpose of the Webb-Pomerene Act, they also are in conflict with the express policy of the foreign assistance program to encourage the efforts of other countries to promote competition and discourage monopoly (22 U.S.C. 2351(a)).

volved here is erroneous under both the stipulated facts and the court's own findings. As a matter of legal form as well as substance, the United States was the purchaser in the two transactions arranged through GSA; and as a matter of legal and commercial substance, under the anti-trust laws it should be treated as the actual purchaser in the others as well.

Indeed, the court found that "AID was at the center of the transaction: it was the force which initiated, directed, controlled and financed them. Without AID, there would have been no sale or purchase and the extent of the role it played was known in every detail to and relied on by both parties to the transaction, particularly by the supplier who looked to [AID] for payment and obligated itself to conform to its requirements and conditions if he was to receive payment." (App. 358.) It recognized that at any time prior to actual delivery the *government, through AID*, could divert the shipment or cancel it. If the regulations governing the procurement were violated, American, rather than Korean, law would define the remedy; and if a false claim for payment were made, the United States, and not Korea, would have the remedy. See Statement, *supra*, p. 10.

The fact that the commodity was procured for shipment to and use in Korea, rather than for domestic consumption or resale, does not dimish the need to protect the United States under the antitrust laws. Procurement for the benefit of foreign countries is the essence of the foreign aid program. In transactions of this kind the buying power of the United States is substituted for the recipient country's lack

of it; and the United States, which is paying the bill,[14] also controls the transaction from beginning to end. If anything, the raison d'être of the foreign aid program, on which the court below relied (App. 358), demonstrates that, in the context of this kind of transaction, it is the United States which, for antitrust purposes, should be treated as the "purchaser" of goods procured and shipped abroad through its efforts and at its expense.[15]

II. AID'S AUTHORITY TO PROHIBIT BY REGULATION CONCERTED PRICING ACTIVITIES BY SUPPLIERS OF COMMODITIES PURCHASED WITH FOREIGN AID FUNDS DOES NOT SUPPLANT THE ANTITRUST LAWS.

While the district court recognized the unfairness of imposing the burden of non-competitive purchasing on the American economy, it found this consideration

[14] Under the AID program there is no net transfer of wealth to this country in payment for the "export trade," whatever may be the program's benefits to American foreign policy (see App. 361). The intangibles of foreign policy gains and losses are not the objective at which the Webb-Pomerene exemption was aimed and do not warrant suspension of the antitrust laws under that Act's limited terms.

[15] Other factors on which the district court relied in finding the Webb-Pomerene exemption applicable (App. 358-359) are no more convincing. As to the counterpart fund arrangement (see note 6, p. 9, *supra*), the funds are restricted to use in Korea and may be used by that country as well as by the United States. This is plainly not the equivalent of repayment. Indeed, it was stipulated that the recipient country is under no obligation to repay the United States (App. 49). Thus, the transactions cannot be legally characterized as a loan of funds and technical service to Korea. The fact that the risk of loss is on Korea after shipment is merely a convenient assignment of responsibility under the terms of the grant. The United States retains full control over the shipment until it is actually delivered (22 C.F.R. 201.44, App. 179).

unpersuasive. Although such concerted activities are likely to increase the cost of foreign aid to the United States and thus limit the effectiveness of appropriations for this purpose, the court held that this was not a matter of antitrust concern. In its view, AID knew it was dealing with a Webb-Pomerene association and had regulatory authority to protect itself and the United States generally by requiring reasonable and competitive prices.[16]

This view misconceives the purpose and scope of the antitrust laws. However sweeping AID's discretionary powers over procurement may be, they plainly do not supplant the application of the antitrust laws to competition for AID-financed procurement. Nor can the agency's powers over procurement oust the primary responsibility of the Attorney General to prosecute and of the courts to remedy violations of the antitrust laws. In those laws Congress has condemned collusive activity and made competition our basic national policy. Only in narrow and specific exceptions involving pervasive and comprehensive schemes of industry regulation has its substituted administrative authority for this primary enforcement responsi-

[16] While the present case was pending in the district court, AID amended its regulations to prohibit Webb-Pomerene bidding on "U.S.-source only" procurements after January 1, 1967 (22 C.F.R. 201.52(a)(7), (1967 Rev.)). This does not obviate the need for relief in the present case, however, because none of the transactions involved here was restricted to "U.S.-source only" and there is no reason to assume that future procurements will be. Indeed, the regulation is always subject to revision by AID, and might be challenged in a separate judicial proceeding relying at least in part on the holding of the district court.

bility,[17] and it has never lodged it in procurement officers.[18] The antitrust laws protect all government procurement from noncompetitive bidding. Procurement officials cannot, by their action or inaction, waive or suspend the Sherman Act. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 227.

CONCLUSION

The judgment of the district court dismissing the complaint should be reversed. Since the stipulated facts show that, unless sanctioned by the Webb-Pomerene Act, the appellees' conduct violated Section 1 of the Sherman Act, the case should be remanded for the entry of appropriate relief against those violations.[19]

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[17] For example, in Interstate Commerce Act, § 5(11), 49 U.S.C. 5(11); Federal Aviation Act, § 444, 49 U.S.C. 1384; Shipping Act of 1916, § 15, 46 U.S.C. 814. See *California* v. *Federal Power Commission*, 369 U.S. 482, 490; *United States* v. *R.C.A.*, 358 U.S. 334, 350–351; *Milk Producers Association* v. *United States*, 362 U.S. 458, 462–463.

[18] In fact, Congress has directed procurement officials receiving bids which evidence a possible antitrust violation to "refer such bids to the Attorney General for appropriate action." 41 U.S.C. 252(d).

[19] The dissolution of the Association on December 28, 1967, does not obviate the need for such relief. In its complaint the government sought to enjoin each of the Association's members from engaging in concerted bidding on any future government procurement (App. 8–9). The members of the Association, which were individually named as defendants, could easily form another association and resume concerted Webb-Pomerene bidding on all procurements not limited to U.S. sources (assum-

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JUNE 1968.

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ing the present regulation remains in force, see *supra*, p. 27, n. 16) whenever they deem it profitable to do so. The case is therefore not moot, and injunctive relief is appropriate. See *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 309; *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 43; *Walling* v. *Reuter Co.*, 321 U.S. 671, 673–674; *Federal Trade Commission* v. *Goodyear Co.*, 304 U.S. 257, 260; *Gray* v. *Sanders*, 372 U.S. 368, 375–376.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 29

UNITED STATES OF AMERICA,

Appellant,

—against—

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., *et al.*

On Appeal From the United States District Court for the Southern District of New York

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 29

UNITED STATES OF AMERICA,

Appellant,

—against—

THE CONCENTRATED PHOSPHATE EXPORT ASSOCIATION, INC., *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' JOINT BRIEF

The United States brought this civil antitrust suit under Section 4 of the Sherman Act (15 U.S.C. § 4) to enjoin an export trade association from selling American-produced phosphate fertilizers to foreign customers whose purchases are financed by the United States foreign aid program. Appellant claims that such sales are not "export trade" as defined by the Webb-Pomerene Export Trade Act (15 U.S.C. §§ 61, 62) and that consequently the cooperative marketing activities of the association necessarily violated Section 1 of the Sherman Act (15 U.S.C. § 1).

Trial was had on a stipulated record which limited the issue to the legality of certain sales made to the Republic of Korea during 1961-1966. The district court entered judg-

ment on September 11, 1967 dismissing the complaint on the ground that "there is no violation of [the] antitrust laws because the activities of defendants were immunized by the Webb-Pomerene Act" (App. 365; 273 F.Supp. 263, 274).

Administrative action by the United States which drastically limited the eligibility of export trade associations to participate in transactions financed by the foreign aid program caused defendants to suspend all operations in June of 1967, and the association was formally dissolved by action which became effective on December 28, 1967.[1]

The Court noted probable jurisdiction of the Government's appeal on April 1, 1968.

Question Presented

Appellees are not satisfied with appellant's statement of the issue (GB 2) and submit the following:

Whether a properly constituted export trade association, engaged in the world-wide marketing of American-pro-

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[1] In Appellees' Motion to Affirm or Dismiss, filed March 15, 1968, we have briefed the facts and the law which show that this case has been mooted by the administrative action taken by the United States and its subsequent effect in causing the dissolution of the export association. We do not repeat that argument here, but respectfully invite the Court's renewed attention to that Motion and again note that an appropriate disposition of the case would be dismissal of the appeal with instructions to vacate the judgment below. *Pope* v. *Daggett*, 384 U.S. 33; *United States* v. *Alaska S.S. Co.*, 253 U.S. 113; *Commercial Cable* v. *Burleson*, 250 U.S. 360; *Mills* v. *Green*, 159 U.S. 651. Dissolution and abandonment under the conditions present here are clearly different from the voluntary discontinuance of an allegedly unlawful practice under the pressures of litigation. Compare *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, and other cases cited by appellant on the mootness question. (GB 28-29, n. 19).

duced commodities, is engaged in "export trade" or an "act done in the course of export trade" within the meaning of the Webb-Pomerene Export Trade Act when, in active competition with foreign suppliers, it sells such commodities for direct shipment to the Republic of Korea and Korea's purchases are financed pursuant to the United States foreign aid program.

Counter-Statement

The Government's "Statement" (GB 3-13) is notable for its scant attention to the facts and in particular for its complete omission of any reference to the active competition which defendants faced from foreign suppliers whose Korean sales were also financed by the United States foreign aid program.

1. The Defendants: Their World-Wide Export Trade Pursuant to the Webb-Pomerene Export Trade Act

The defendants are five Florida producers of concentrated phosphate fertilizers and their joint export trade association, the Concentrated Phosphate Export Association, Inc. ("CPEA"), which was organized in 1961 and duly registered with the Federal Trade Commission as a non-profit corporation "to engage solely in export trade," as that term is defined in the Webb-Pomerene Export Trade Act, 15 U.S.C. § 61 (sometimes referred to here as the "Webb Act" or the "Export Trade Act"). (App. 42-44, 63). It is stipulated that CPEA was properly organized pursuant to the terms of that statute, has observed all of its requirements, and has violated none of its prohibitions, unless, and only to the extent that, the transactions in suit are found not to constitute "export trade" (App. 42, 45, Stip. 1, 12).

CPEA was a "full functioning" export association, acting as a merchant of its members' phosphate fertilizers. That is to say, it was not limited to establishing the prices at which its members' goods would be sold, nor to allocating available business among them, but performed all the functions of an export marketing organization, including the development of foreign markets, appointment of agents, product promotion, negotiation of sales contracts, preparation and submission of bids, arrangements for ocean transportation, arrangement of credit and other terms and conditions of sale, and the vast amount of paper work involved in export documentation, billings and collections (App. 52-54, 63-68, 264, 266-268, 303, 315). In order to carry out these functions, the association had offices and a full-time staff with headquarters in New York City (App. 43, Stip. 2). Dealings between CPEA and its members were governed by a Membership Agreement (App. 69-76), and the internal functioning and powers of CPEA—including the powers of contract, borrowing money, holding property and establishing agencies—were determined by its Certificate of Incorporation and By-Laws (App. 63-68; Ex. 4, pp. 59-67).

All of CPEA's members produced concentrated phosphate fertilizers in Florida plants from phosphate rock mined in Florida (App. 43-44, Stip. 3-8). The fertilizers were transported directly from production plants to Florida seaports, where they were loaded on ships for export to foreign consumers (App. 46, Stip. 14). CPEA purchased the commodities from its members at prices established from time to time by a board of directors representing all of the members; and resold them in the export market at prices and on terms and conditions which it determined, subject, however, to minimum prices established from time

to time by its directors (App. 71, ¶ Fourth; App. 73, ¶ Ninth). Each member was entitled to participate in the association's business in proportion to its percentage of the total concentrated phosphate production capacity of all members (App. 71, ¶ Sixth).

During the six years it was in existence, CPEA sold concentrated phosphates for export to thirty-nine foreign countries in active competition with a large number of major foreign producers located in Tunisia, Morocco, Portugal, Mexico, Germany and the Netherlands, among other countries, and twenty-one American suppliers who were not members of the association.[2] Except for the particular Korean sales in suit, the Government does not dispute that CPEA's world-wide marketing activities were entirely lawful (App. 42, 45, Stip. 1, 12).

2. CPEA's AID-Financed Korean Export Sales: General Description

The Republic of Korea procured concentrated phosphates from American and foreign suppliers on thirteen occasions during the times material to this case (App. 50, 327-340). Each purchase was made on the basis of supply contracts awarded after formal competitive bidding in which not less than three, and as many as thirteen, competing suppliers participated on every occasion (App. 327-340). CPEA submitted bids on twelve of the transactions and was awarded at least some of the business on nine of them (*Ibid.*).

[2] The United States foreign aid program is itself contributing to the creation of additional foreign competition in world markets for concentrated phosphates by guaranteeing fertilizer plant investments in India, Nicaragua, Morocco and elsewhere and by financing the construction of plants in Korea (App. 60-61, Stip. 42-43).

One of the twelve Korean transactions on which CPEA bid and received an award was funded from the Republic of Korea's own supply of dollars (App. 50-51, Stip. 25). The legality of that sale is not disputed here—presumably because it was not financed through regular foreign aid procedures.

Another Korean purchase was financed by a special Stabilization Fund granted by the United States in 1961 "to meet Korea's need for foreign exchange and to offset the anticipated short-term reduction in Korea's dollar earnings resulting from Korea's major reform in 1961 of its monetary exchange system" (App. 51, Stip. 25). CPEA's sale on that occasion is also unchallenged here, and thus is conceded to be "export trade" within the Webb Act—presumably because administrative regulations governing the foreign aid program were not applicable. The transaction was, however, controlled by Korea's usual procurement regulations (App. 189-200) and by the provisions of an agreement between the two governments which embodied the substance of the principal financing requirements of the foreign aid program (App. 51, Stip. 25).

The remaining ten Korean transactions in which CPEA participated were all financed by the foreign aid program pursuant to the terms of applicable Korean and United States statutes, the provisions of bilateral agreements between the two countries, and relevant administrative regulations of the two governments. CPEA's activities were the same in these instances as they were in all of the association's world-wide sales, including the first two Korean tenders described above, except for the additional documentation required by AID's regulations. In each instance the goods offered and sold by CPEA were exported

from the United States to Korea in competition with foreign suppliers. In spite of these facts, the Government urges that the transactions here in issue were not in "export trade", only because they depended on foreign aid financing and were subject to regulations applicable to such financing.

In addition to its Korean exports, CPEA sold to many other foreign customers, including some whose purchases were also financed by AID funds. In most, if not all, of these latter instances, the buyer did not arrange for AID financing until after his supply contract had been awarded or negotiated. (App. 54, Stip. 36). The Government does not dispute the lawfulness of such sales, although their eligibility for foreign aid financing was also contingent on full compliance with AID's regulations at all stages of the negotiations. (App. 42, 45, 54, Stip. 1, 12, 36).

3. Korea's AID-Financed Procurements

a. The United States foreign aid program

In one form or another, economic assistance has been extended by the United States to foreign nations since at least as early as World War I, and has most recently been formalized under the "Marshall Plan" and its various successors of the last two decades.[3] The basic statute controlling present programs of foreign aid is the Foreign Assistance Act of 1961, 75 Stat. 424, as amended, 22 U.S.C. § 2151, which serves the twin purposes of supporting the maintenance of freedom and mutual security abroad and of encouraging the development of permanent American

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[3] See, *e.g.*: BANE & LUTZ, ORGANIZATION OF AMERICAN RELIEF IN EUROPE, 1918-1919, Stanford Univ. Press (1943); FEDERAL TRADE COMMISSION, FOREIGN TRADE, SERIES No. 2, at 6-7 (1935); App. 52; Economic Cooperation Act of 1948, 62 Stat. 137; and the Mutual Security Act of 1954, 68 Stat. 832.

export markets by making temporary economic assistance available to offset a portion of the foreign exchange costs necessary to meet import and capital requirements of cooperating countries.[4]

In furtherance of the provisions of that Act, Congress has each year been asked to appropriate funds to support foreign assistance programs administered by the Agency for International Development ("AID"), successor organization to the International Cooperation Administration ("ICA"). Those funds are not "earmarked" by Congress, either for specific countries or for particular commodities, but are allocated by AID as a discretionary matter according to terms set both by Congress and by the provisions of bilateral agreements between the United States and each cooperating country. (App. 46-49).

Such aid is made available on a grant or a loan basis, and in either case the repayment obligations assumed by beneficiary nations vary widely. In practice, the distinction between the two forms of assistance tends to be blurred because of the liberal terms on which loans are extended and the conditions and obligations attached to grants.[5] However, cooperating countries which receive grant aid are invariably obligated to deposit in "counterpart funds" the amounts of local currency generated by the import and resale of AID-financed goods. Drawing rights on those funds, as well as other terms and conditions of the grant aid, are laid down in agreements between the United States and the cooperating country.

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[4] See, *e.g.*, testimony of David E. Bell, AID Administrator, before Senate Banking and Currency Committee, 111 CONG. REC. A 1346 (daily ed. March 23, 1965).

[5] See ASHER, LOANS, GRANTS AND LOCAL CURRENCIES 7, The Brookings Institution (1961).

b. *The United States aid program for Korea*

The United States and the Republic of Korea have since 1953 been parties to agreements providing for economic, technical and related assistance to the latter country (App. 47, 77-140).[6] The basic agreement in force during the years involved in this case took the form of an exchange of notes by the two governments on February 8, 1961 (App. 77-89). That agreement, and others incidental to it, controlled Korea's use, as a sovereign nation, of the foreign aid it received from the United States, and, in case of conflict, the agreements took precedence over AID's administrative regulations (App. 111, Section 4.1).

In consideration of the economic and related assistance it was to receive, Korea, for its part, undertook two principal obligations; reaffirmation of her responsibilities under a 1953 treaty of mutual defense, and creation of a counterpart fund (App. 83-84, ¶ 3-4).

The Korean government resold to its nationals the concentrated phosphates, and other commodities, which it purchased and imported with AID grant funds. All local currency received from the resale was deposited in the counterpart fund, and it was agreed in principle that the amount of the fund should be closely equivalent to the dollar landed cost of the imported goods (App. 94, ¶ 2).[7]

The entire amount of the Korean counterpart fund was "available to the Government of the United States" for its local currency requirements (App. 79, ¶ 4), but in prac-

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[6] Korea has received similar assistance from other countries, including Japan and West Germany (App. 48, Stip. 19).

[7] Balances remaining in the counterpart fund at the end of the aid program are to be liquidated as agreed by the two governments, subject to approval of the United States Congress (App. 79, ¶ 4).

tice the major portion of it went to support the Korean military budget. In this way, Korea has been able to maintain 50,000 troops in Vietnam and to play a "major role with the United States in the containment or deterring of Communist aggression in South Vietnam and Northeast Asia."[8]

AID's role in Korea's commodity import and development programs has been that of a financing agency and advisor, working with Korean agencies to determine that country's import commodity needs and foreign exchange requirements and, at the same time, rationalizing those needs and requirements with the overall budget for United States foreign aid (App. 48-49, Stip. 20-21; App. 108-120). The basic decisions on Korea's needs and proposed imports were Korean decisions, and it is specifically agreed between the two countries—as independent, sovereign nations—that the Republic of Korea has "full responsibility for procurement and speedy delivery" (App. 102, ¶ 1).

c. AID's role and regulations

There is no doubt that AID, as the administrator of this country's foreign assistance program, exercises a high degree of supervision over the foreign trade transactions which it finances. To characterize it in the Government's terms, however, as determining "every significant detail of the entire transaction" (GB 9), or to suggest that it is the purchaser in such transactions (GB 15), is entirely inconsistent with the facts and with AID's own description of its role in public pronouncements and official documents.

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[8] AGENCY FOR INTERNATIONAL DEVELOPMENT, U.S. FOREIGN AID IN EAST ASIA, 23, 25, Washington, D.C. (1968).

It is stipulated here that "AID did not itself procure any concentrated phosphates for Korea" and, that "AID, in its official publications, is characterized as essentially a financing institution. . . ." (App. 49, Stip. 21). Appellant may not now make the contrary assertion that the "goods [are] sold to the United States for export. . . ." (GB 15).

The AID program was never intended to, and does not, supplant ordinary channels of trade, nor change the substance of transactions between American suppliers and foreign buyers.[9] It is a method of financing the foreign exchange costs of international transactions essential to our friends and allies who are themselves unable to meet those costs. A temporary measure, foreign aid, whether it takes the form of grants or of loans, has been consistently represented by its proponents and administrators as a means of stimulating export trade which obtains a net economic advantage for the United States in world markets.[10]

AID's part in Korea's international commodity transactions begins when it receives for evaluation and review, in consultation with Korean government officials, the esti-

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[9] App. 49, Stip. 21; and see, *e.g.*, *Hearings Pursuant to S. Res. 26 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. 76, 85 (1967).

[10] "In fiscal year 1967, AID economic programs financed more than $1.3 billion in export sales for American firms. Among other items, AID financed the export of $109 million in fertilizer, $150 million in chemicals, $120 million in iron and steel products, $360 million worth of machinery and equipment and $127 million worth of motor vehicles, engines and parts. These exports create several hundred thousand American jobs and build permanent markets for future cash exports." Agency for International Development, The Task of Development 30 (1968). See also COMMITTEE ON FOREIGN AFFAIRS, REPORT ON H.R. 15263, H.R. REP. No. 1587, 90th Cong., 2nd Sess. 10 (1968).

mates and projections for import commodity needs prepared by Korean agencies. These estimates and projections, as finally determined, together with those from all other cooperating countries, are the raw materials on which AID bases the total foreign aid budget to be presented to Congress. (App. 48, Stip. 20-21).

A particular international commodity transaction to be financed from AID funds is initiated by Korean officials when, having decided on the type and quantity of commodity they wish to purchase on the world market, they submit a "Procurement Authorization Application" to AID (App. 48-49, Stip. 21). That application is approved when AID, in turn, issues a "Procurement Authorization" (App. 49), on the authority of which the transaction can be financed from grant or loan funds and a letter of credit opened in favor of the supplier or suppliers (App. 102-107).[11]

The principal responsibility for Korea's procurement of concentrated phosphates under the AID program was vested in the Office of Supply, Republic of Korea ("OSROK") (App. 51, Stip. 27), although the two governments agreed that in special circumstances an agency of the United States might act as the procurement authority at OSROK's request and on its behalf (App. 102).

Of the eleven Korean procurements of concentrated phosphates financed by AID, OSROK handled nine directly and the United States General Services Administration ("GSA") undertook two. The other two purchases made

[11] In the transactions involved in this case, the Bank of Korea opened a letter of credit in favor of the supplier and instructed its United States correspondent—the J. Henry Schroder Banking Corporation—to make payment in dollars to the U.S. or foreign supplier. The Schroder Bank, in turn, was reimbursed by AID pursuant to a Letter of Commitment.

by Korea, one from its own foreign exchange and the other from the special Stabilization Fund granted to it by the United States, were also handled by OSROK. (App. 50). AID did not itself exercise any procurement functions in any of the transactions (App. 49, Stip. 21).

All of the concentrated phosphates purchased by Korea were exported from this country or from other foreign countries to Korea, and were used there. (App. 50, Stip. 24). Such sales were documented as export sales and were recognized as such by the parties involved, including AID (*e.g.*, App. 178, §201.31(e); App. 251-264). CPEA's dealings were with its Korean customer, and it was directly represented in that market by local businessmen and an agronomist (App. 52-53, Stip. 30-33).

OSROK issued the invitations to bid on each of the eleven purchases it made directly; bidders were required to register in Korea pursuant to Korean regulations; and bids were submitted in Seoul (App. 52-53, 220-237). OSROK evaluated all bids, determined the successful bidders, awarded contracts, and opened the necessary letters of credit (App. 238, 241, 246-247, 251 ff.). Suppliers posted performance bonds in Seoul which were payable on OSROK's certification that terms and conditions of the supply contract had not been met (App. 216-217, 264). Shipment was made on OSROK's "call"; OSROK, designated as "buyer," handled the insurance; and any disputes arising from performance under such supply contracts were resolved in Korea (App. 189-200, 214, 219).

In all of the OSROK procurements, dealings and contractual relations between the Korean purchaser, on the one hand, and CPEA and other suppliers, on the other, were precisely the same, whether the transactions were financed by AID, by Korea's own foreign exchange, or by

the special Stabilization Fund (App. 51, Stip. 27, 201-281). Where AID financing was present, however, seller and buyer both undertook the additional obligations imposed on them by the applicable regulations.

In two instances, GSA, rather than OSROK, acted as procurement agency—once in 1963 and once in 1964 (App. 50). The export character of those transactions, however, remained unmistakably clear (App. 303). The commodities were consigned for shipment to OSROK (Ex. 37-38 A, pp. 360-377 A). GSA had neither a beneficial interest in, nor title to, the materials, but acted on behalf of the Korean government, at its request and with its approval (App. 102, ¶ 2; App. 284, Part II; App. 296).

Foreign suppliers were eligible to bid on every one of the Korean tenders and to receive payment in dollars from AID funds if successful (App. 59, Stip. 40). CPEA's foreign competitors did bid on all but two of the thirteen tenders, and one or more of them were awarded supply contracts on eight transactions (App. 327-340).

Where AID financing was used by Korea, AID's regulations (collectively known as Regulation 1) were applicable to require both buyer and seller to submit detailed documentation assuring AID of an opportunity to determine that its loans and grants were not being used wastefully or improperly, but in conformity with the purposes of the foreign assistance program (App. 141-188). The regulations are described as setting forth "requirements for A.I.D. financing" and imposed on Korea responsibility for assuring compliance with their provisions by both importers and suppliers (App. 175, §§ 201.02(a), 201.10).

It is the clear purpose of AID's regulations to determine the terms and conditions under which the agency will finance particular commodity transactions; not to

alter or affect the commercial substance of dealings between supplier and user, and certainly not to transform an export sale into a domestic transaction. "In general, the fact that a particular purchase is to be paid for by ICA will not basically affect the way in which an importer or supplier does business." (App. 146, § 201.2(B))[12]

Thus, Regulation 1, as well as all other pertinent documents, consistently speaks in terms of "A.I.D. financing" (App. 175, § 201.02(b)), eligibility "for financing" (App. 176, § 201.14), "delivery services financed by A.I.D." (App. 179, § 201.32(a)), AID's "methods of financing" (App. 180, § 201.51), "rules and procedures governing transactions to be financed" (App. 134, Part II), "the financing of essential imported goods and services" (App. 118, ¶ D), and so on and on. Moreover, the same regulations uniformly describe the transactions to be financed by AID as "exports" (*e.g.*, App. 183, § 201.63) and require that export licenses be obtained where necessary (App. 178, § 201.31 (e)).

Perhaps the single most important limitation which the regulations impose on buyers and sellers in AID-financed transactions is designed to ensure that cooperating countries will pay no more than the prevailing free market price as established by ordinary competition, whether the sale is financed by grant or by loan. (App. 182-183, Subpart G). Thus, an export sale from the United States (or other supply source) will not be eligible for financing unless the price is no higher than "the market price prevailing in comparable export sales in the United States" or "in com-

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[12] And see, to the same effect, the testimony of John Shute, Chief, Financial and Procurement Methods Division, ICA, *Investigation of Commodity Credit Corporation*, Hearings before House Committee on Government Operations, 85th Cong., 2d Sess. 122 (1958).

parable domestic sales in the United States at the time of purchase . . ." (App. 183, § 201.63(a)). OSROK imposed a similar requirement on its suppliers, even when AID financing was not employed, as in the case of the unchallenged sales made by CPEA and paid for from Korea's own foreign exchange and from the Stabilization Fund grant. (App. 197).

Table 1, reproduced in the Appendix to this brief from defendants' brief below, presents in tabular form the purchasing, supply and financing responsibilities of OSROK, its suppliers and AID.

4. CPEA's Direct Participation in the Korean Market

CPEA was not simply a distant bidder for Korea's fertilizer business, but entered that market in an active and direct manner in order to develop a demand for American-produced concentrated phosphates.[13] To this end, it dealt with the Korean agencies whose responsibility it was to make the basic decisions on grades, quantities and concentrations of phosphate fertilizers to be imported, and carried on an active program to familiarize Korean farmers with the balanced use of phosphate fertilizers (App. 53).[14]

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[13] CPEA was one of the few export associations to perform a wide range of marketing functions, thereby most completely serving the original purpose of the Webb-Pomerene Act. FEDERAL TRADE COMMISSION, ECONOMIC REPORT ON WEBB-POMERENE ASSOCIATIONS 15, 49-50 (1967).

[14] At the time when CPEA first entered the Korean market, agriculturists in that country were largely unfamiliar with the use of phosphate fertilizers, and Korean officials did not even consult with their American counterparts on "the quantities of the various types of fertilizer to be imported and the purpose for which fertilizer was to be used." Report to Congress by the Controller General of the United States, *Examination of Economic and Technical Assistance Program for Korea*, (FY 1957-1961), 108, see also pp. 24, 107, 109.

CPEA established and operated a Korean organization to carry out these efforts, including local business representatives and an agronomist (App. 52-53). Such market development was of vital importance to offset the higher unit costs of concentrated phosphates by educating procurement officials and users in the advantages of a fertilizer with a higher value of plant nutrient per unit. (See *e.g.*, App. 207). In this instance, the association's self-interest coincided with a primary objective of the AID program for East Asia: to concentrate on ways and means for increased food production through the more effective use of fertilizers, insecticides, seeds and arable lands. (See AGENCY FOR INTERNATIONAL DEVELOPMENT, U.S. FOREIGN AID IN EAST ASIA 24, Washington, D.C. (1968); Foreign Assistance Act of 1961, 22 U.S.C. § 2175; the Foreign Assistance Program—AID's Annual Report to Congress, Fiscal Year 1966, at 3).

5. Summary of Korea's Thirteen Phosphate Procurements

The Government's "statement" is concerned almost entirely with matters of procedure, rather than substance, and does not deal with the facts concerning Korea's procurements of concentrated phosphates, nor with the quality and quantity of foreign and domestic competition for Korea's AID-financed business. Taken as a whole, those facts show that there was active and substantial foreign competition in the market; and the Export Trade Act was principally concerned, after all, with such competition. Moreover, at least twenty other American suppliers were active in making one or more bids. All of the contracts won by CPEA were awarded after formal, competitive bidding; all but one of them in competition with foreign concerns. Prices were freely competitive and varied substantially, and their general trend was downwards.

In view of the obvious importance of the facts to this—as to any other—case, we summarize below the principal elements of Korea's thirteen purchases, in chronological order and by tender number.

1847-C: OSROK solicited bids for 70,000 tons of "phosphatic materials" in October of 1961 and actually awarded a contract to supply 96,325 tons.[18] CPEA was the successful bidder, with prices offered in a range from $65.25 a ton to $70.60 a ton for triple superphosphate, and was awarded a contract at $66.47. A European competitor bid on 20,000 tons at $71.00; and three other United States suppliers offered different types of phosphatic fertilizers. (App. 327).

2001-N: In February of 1962, OSROK requested bids on 40,000 tons of triple superphosphate to be financed from the special Stabilization Fund granted to it by the United States in 1961 (p. 6, *supra*). A Tunisian supplier, SIAPE, was the low bidder, with a price of $57.00 for 10,000 tons; another American supplier was high at $78.06; and CPEA offered prices ranging from $58.47 to $61.93. SIAPE was awarded a contract for 10,000 tons; CPEA for 68,516. (App. 328). It would appear that the Government does not dispute that CPEA was engaged in "export trade" on this occasion since AID regulations were not applicable, although Korea used "grant" funds.

2035-N: OSROK offered to buy 50,000 tons of "phosphatic materials" with Korea's own foreign exchange funds in April of 1962. CPEA offered triple superphosphate at

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[18] Although each Korean invitation specified a particular quantity, it also stipulated that the quantity purchased would be determined by the amount of funds available. Accordingly, supply contracts were invariably awarded for different—usually larger—volumes than those announced. (App. 327-340).

prices ranging from $57.77 to $58.60; another U.S. supplier submitted a bid of $55.93; and five foreign suppliers, two from Holland and one each from Portugal, Tunisia and Germany, entered bids at levels from $55.50 to $59.10. In addition, two domestic, and at least two foreign concerns—one from Portugal and at least one from Japan—offered to supply other types of phosphate fertilizers. CPEA received an award of 10,000 tons; 5,000 tons were awarded to another United States concern; and 87,670 tons went to Portuguese, German and Japanese competitors (App. 329). The Government does not challenge CPEA's participation in this tender, since no foreign aid funds were involved.

2075-N: OSROK invited bids in August of 1962 to supply 200,000 tons of triple superphosphate to be purchased with AID-grant funds. On this occasion, CPEA's prices were between $53.30 and $55.20—some three to four dollars a ton less than it had quoted in April of the same year. A Portuguese supplier came in at $52.70, and two U.S. concerns offered $52.05 and $53.53, respectively. CPEA was awarded 149,500 tons; another Florida producer, 30,000 (App. 330).

29247-A & N: In March and April of 1963, GSA acted on behalf of OSROK and requested bids for 36,000 tons of triple superphosphate. CPEA unsuccessfully quoted prices of $55.18 and $53.25. Awards went to suppliers from Tunisia and Portugal, at prices of $49.50 and $50.00, and to two American suppliers at $51.84 and $52.50. Another foreign supplier, specifying Algeria, Morocco or Portugal as his source, was high at $68.00 (App. 331).

3057-N: OSROK invited tenders for 120,000 tons of triple superphosphate in July of 1963. CPEA reduced the

prices at which it had lost the April business and bid from $51.00 to $53.34, with its lowest price quoted on a quantity of 240,000 tons. Eight different suppliers, one of them a foreign concern based in Tunisia, competed on this tender. The Tunisian company quoted its phosphates at from $50.00 to $51.00. Prices of other American bidders varied from $50.35 to $66.61. The Tunisian concern was awarded 30,000 tons; CPEA, 185,200 tons; and other American concerns 26,000 tons (App. 332).

29849-A & N: GSA, for the second and last time, acted for OSROK in March and April of 1964 when it solicited bids for the supply of diammonium phosphate. Bids were submitted by eleven American suppliers and one Mexican company at prices ranging from $81.32 to $120.67. CPEA's price of $86.95 won an award of 92,000 tons, and 20,100 went to other U.S. concerns (App. 333-334).

4050-N: OSROK published invitations to bid on 170,000 tons of triple superphosphate in August of 1964, to which it received responses from two Tunisian, one Mexican and six domestic suppliers, including CPEA. Prices offered ranged from a low of $50.54 to a high of $60.15, with CPEA at $53.96. The association was awarded 136,500 tons at that price; and 12,000 tons went to Swift & Co. at prices ranging from $52.45 to $53.58 (App. 335). In October, OSROK issued a re-tender seeking an additional 10,000 tons on this same procurement. CPEA was low with a bid of $56.51 and was awarded 10,000 tons. Armour & Co. received 19,400 tons at $57.94; and two Tunisian suppliers received a total of 39,600 tons at prices varying from $60.30 to $60.45 (App. 337).

5009-N: A second diammonium phosphate tender issued by OSROK in April of 1965 was the first transaction since

1961 on which CPEA did not face foreign competition, and the second on which it received no award. Prices offered by CPEA and four domestic competitors ranged from a low of $78.64 to a high of $127.86, with CPEA at $84.74, down about $2.00 from its previous, successful bid on this commodity (App. 337).

5066-N: In July of 1965, OSROK requested bids on 150,000 tons of triple superphosphate and made awards on 206,800 tons. Ten suppliers competed for the business, including four from Tunisia, Morocco and Portugal. CPEA's price of $57.80 compared with the low bid of $55.82 and a high of $64.35, and won an award of 153,200 tons. The balance of the contract went to one American and two foreign suppliers (App. 338).

5094-N: OSROK issued invitations to bid on 35,000 tons of triple superphosphate in September of 1965 and awarded contracts to supply a total of 47,590 tons. The eleven bidders included suppliers from Morocco, Tunisia (2) and Portugal and prices ranged from $57.55 to $64.35. CPEA did not participate in this transaction, and the bulk of the tonnage was awarded to Maroc Chimie of Safi, Morocco (App. 339).

6011-N: The last procurement reflected in the record resulted from an invitation issued by OSROK in April of 1966 to bid on 90,000 tons of triple superphosphate. 138,400 tons were awarded on bids submitted by eleven domestic and two foreign competitors, ranging from a low price of $57.99 to a high of $66.15. Although CPEA's price of $59.47 was among the lower offers, it failed to receive any award. 40,000 tons were awarded to a Moroccan supplier whose bid was slightly higher than the association's (App. 340).

6. The Proceedings Below

The United States filed its complaint against CPEA and its member companies on December 21, 1964, alleging that the activities of the association constituted "a continuing agreement, understanding and concert of action among the defendants to allocate business among the defendant producers and to eliminate price competition in sales of concentrated phosphatic fertilizer made pursuant to the United States foreign aid program for Korea" (App. 7). The defendants promptly filed their several answers denying the substantive allegations of the complaint and pleading as affirmative defenses, (a) the Webb-Pomerene Export Trade Act, (b) the fact that the Federal Trade Commission had not exercised its special powers under that Act to investigate, or otherwise to proceed against, CPEA, and (c) the inducement and approval of CPEA's bids and sales by AID and OSROK (App. 10-38).

As modified in the course of the proceedings, the relief sought by the Government below was an injunction against CPEA's continued participation in business "in connection with foreign aid procurements." Just as it has shifted its theories of the case,[18] however, appellant now describes its prayer below as a request for "an injunction against further concerted activity by the defendant firms in connection with foreign aid and *all other transactions*" (GB 11, emphasis added).

After protracted negotiations, the parties stipulated the record on August 19, 1966, and the stipulation was accepted

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[18] While the complaint alleged that Korea's AID-financed purchases were made on a "Buy America" basis, "limited substantially to sources within the United States" (App. 5), it is evident from the stipulated facts that such is not the case and that CPEA faced substantial foreign competition in this, as in all other markets.

by the district court "as the sole and entire record upon which the Court's decision of this case will be rendered" (App. 39).[17]

After briefing, the case was argued before the Honorable Sylvester J. Ryan on March 20, 1967 (App. 1). At that time, in response to questions from the bench, appellant's counsel clarified the record by stating that CPEA was not alleged to have overcharged, or to have engaged in any unreasonable or discriminatory pricing, on any of its sales (App. 342-345).

Before argument of the case below, but after execution of the binding stipulation of facts, AID had announced a revision of its regulations to make export associations dealing in certain commodities, including phosphates, ineligible for participation after January 1, 1967 in AID-financed transactions when procurement sources are limited to the United States.[18] It has been estimated that well over 90% of all foreign aid transactions are now so limited,[19] and consequently, because of the uncertainties and practical implications of the amended regulations, CPEA ceased active

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[17] All formal discovery procedures were obviated by the parties' agreement to stipulate the record, although one of the defendants had promptly noticed the examination of Government officials pursuant to Rule 26, Federal Rules of Civil Procedure. A full trial on the merits was, of course, abandoned by both sides, and numerous areas of factual investigation considered by one or another of the parties to be of significance were set aside by mutual agreement in the course of negotiations extending over a period of eighteen months.

[18] 22 C.F.R. 201.01 (v), 201.52 (a) (7), 201.73, Appendix D; 31 F.R. 16693 (December 30, 1966). A copy of the Federal Register Notice is printed as Appendix A to the Appellees' Motion to Affirm or Dismiss.

[19] Agency for International Development, Operations Report (FY 1967) p. 74. See also *Hearings Before the Subcomm. on Foreign Operations and Related Agencies of the House Comm. on Appropriations*, 89th Cong., 2d Sess., pt. 2, at 9, 1019 (1966).

operations in June of 1967, about three months before the district court's decision.[20] On December 28, 1967, the association was formally dissolved.

On September 11, 1967 the district court handed down its decision dismissing the complaint (App. 1). Judge Ryan, having carefully considered the stipulated facts and the arguments advanced by both sides, reasoned "that the answer lies in the wording of the statute" (App. 349). Pointing out that CPEA sold goods which were concededly "for shipment to the Republic of Korea," that "the commodities were used in Korea," that export associations had sold for many years under various types of foreign aid programs, and that no showing or allegation had been made that CPEA's activities were "unreasonable," (App. 358, 364, 365), Judge Ryan's decision was bottomed on his conclusion that,

> "Much as plaintiff strains at the meaning of the words 'export trade,' we are unable to find any ambiguity in them." (App. 360.)

Introduction and Summary of Argument

The Government's case rests on the thesis that CPEA's bids and AID-financed export sales to the Republic of Korea constituted a *per se* violation of Section 1 of the Sherman Act because the association's prices were determined by its member companies, who were otherwise competing American producers of concentrated phosphates. But CPEA was

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[20] To be sure, AID could rescind its new regulations, but the possibility seems remote and is in any event insufficient reason to rescue the case from mootness. There need be no concern here that a dismissal for mootness would "grant defendants . . . a powerful weapon against public law enforcement." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632.

concededly a properly organized and duly registered Webb Act export trade association.

Section 2 of the Webb-Pomerene Export Trade Act exempts such an association and its members from the prohibitions of the Sherman Act when they are "actually engaged solely in such export trade," and also exempts any "agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association." It is not charged that defendants ran afoul of that proviso or of a second proviso, "that such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein."

Consequently, the sole question for the Court is whether the particular Korean transactions in suit were "export trade" within the meaning of the Webb Act.

That Act's definition of its scope is clear and precise, using language of long-established meaning and common understanding. Since it grants an express, rather than an implied, antitrust exemption, the statute is to be given its plain meaning, so that activities literally covered by the Act may not be read out of its general grant of immunity by means of an artificial or contri ed construction.

The AID-financed Korean trade in concentrated phosphates unquestionably constituted "export trade" from the United States for the American producers, including CPEA,

who received supply contracts. Their sales were export sales, developed by agreements made and acts done "in the course of export trade," as those terms are commonly understood and settled in the law, now as at the time when the Export Trade Act became law. The fact that AID funds financed the trade, and that AID regulations controlled the terms of that financing, do not change the export character of the business.

Appellant can prevail here only if the plain meaning, design and legislative history of the Webb-Pomerene Export Trade Act are rejected. On the other hand, an affirmance of the district court's judgment will, on the facts of the case, be in harmony with that statute and carry out its purpose of promoting more effective competition by American firms for a substantial position in world markets.

The Korean transactions had all the elements of the "export trade" for which Congress fashioned the joint export association as a pro-competitive tool. To the extent that American firms were successful, their sales were undoubtedly exports. The presence of active foreign competition—nowhere mentioned in the Government's brief—meant that a lack of success would result in a loss of markets, and of AID dollars, to foreign nations; and this was precisely the result which Congress intended to minimize by permitting American concerns to achieve an economy of scale by pooling their export resources.

Legislative history and fifty years of practice confirm the plain meaning of the statute. Congress was well aware when it adopted the Export Trade Act that a substantial volume of export trade was, and would continue to be, financed by the United States; and export trade associations have regularly sold their goods to the beneficiaries of foreign assistance programs since immediately after the

First World War. AID has itself circulated a publication encouraging the formation of Webb associations as effective vehicles for participating in the foreign markets which it finances.

Appellant has shifted the emphasis of its case in this Court, now stressing an assertion that was put forward only incidentally below: that CPEA's Korean sales, even though they may be in export trade, are in some fashion a "burden" on the American economy and therefore in conflict with the Webb Act's purposes. This record, however, contains no evidence that defendants' purpose was to "use" the Webb Act in order to take unfair advantage of the foreign aid program; nor is there any evidence whatever that CPEA might have "burdened" that program in fact.

Defendants' cooperative export activities were worldwide in scope and reached many foreign markets, thus carrying out precisely the purposes of the Act. Their particular Korean bids and sales, made in active competition with foreign suppliers, served those same purposes and were at prices conceded to have been reasonable, competitive and non-discriminatory. Moreover, AID itself possessed and exercised broad discretionary powers to guard against any "burdening" of the export transactions it financed.

The Government, lacking any evidence of a "burden" in fact, suggests that *per se* concepts of antitrust illegality be applied in order to reach the desired result of creating some appearance of conflict between CPEA's operations and the intended scope of the Export Trade Act. Such an approach, however, is scarcely instructive when the statute to be construed expressly exempts the challenged activities from the Sherman Act, particularly so where Congress has repeatedly recognized the desirability of cooperation and combination in our foreign trade.

ARGUMENT

POINT I

By Its Clear Language and Plain Meaning, the Webb-Pomerene Export Trade Act Applies on the Agreed-Upon Facts of This Case to Defendants' AID-Financed Korean Sales.

The Export Trade Act uses clear and precise language, with a settled content, in defining the trade and commerce to which it extends; and the Act is to be construed according to the plain meaning of that language. As so interpreted, the statute undoubtedly applies to the AID-financed Korean transactions, since it is stipulated that in each case the commodities sold by CPEA were exported from the United States to the Republic of Korea.

A. The Export Trade Act's Definition of "Export Trade" Is to Be Given Its Plain Meaning

The present provisions of the Webb Act are the result of long and careful deliberation by the 64th and 65th Congresses, following an extensive investigation and voluminous report by the Federal Trade Commission on the desirability of permitting American concerns to cooperate in exporting their products to foreign markets.[21] Particular care was exercised in drafting a precise definition of

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[21] The substance of the law was recommended in the REPORT OF THE FEDERAL TRADE COMMISSION ON COOPERATION IN AMERICAN EXPORT TRADE, 1916. The first bills to implement that recommendation were introduced in the 64th Congress (H.R. 16707, 64th Cong., 1st Sess.; S. 6865, 64th Cong., 1st Sess.), and an extensive series of hearings, debates, Committee reports and amendments ensued before the legislation was finally approved by the Second Session of the 65th Congress on April 10, 1918 (56 CONG. REC. 4999).

"export trade," for that was the heart of the bill and of the debate which surrounded it, and the final result emerged in the following provision:

> "Sec. 1. The words 'export trade' wherever used in this Act mean solely trade or commerce in goods, wares or merchandise exported, or in the course of being exported, from the United States or any territory thereof to any foreign nation; but the words 'export trade' shall not be deemed to include the production, manufacture, or selling for consumption or for resale, within the United States or any territory thereof, of such goods, wares or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale" (40 Stat. 516, 15 U.S.C. §61).

Congress uses words in the sense of their common and ordinary meaning. *Hanover Bank* v. *Commissioner*, 369 U.S. 672, 687; *United States* v. *Cooper Corp.*, 312 U.S. 600, 606. In 1918, as now, an "export" was commonly understood and invariably defined in terms of its final resting place, that is, a commodity which is sent abroad, "especially to foreign countries." [22]

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[22] WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (Reference History ed., 1916). WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961) defines the verb as, "to carry or send a commodity to some other country." See HENIUS, DICTIONARY OF FOREIGN TRADE (1946): ". . . [Export] . . . has come to mean both the articles that are exported and the transaction, that is, the act of sending them out of a country. It serves, thus, both as a verb and as a noun. The exports of a country are the goods and products that it sends abroad." Official Government statistical reports define exports as, "the physical movement of merchandise out of the United States customs area to foreign countries, *without regard to the method of financing*. . . ." U. S. BUREAU OF THE CENSUS, UNITED STATES EXPORT STATISTICS, REPORT FT 410, at 1, (August, 1963) emphasis added.

"Export," and its variations, had been employed by Congress long before passage of the Export Trade Act, as in "drawback" provisions of the Tariff Acts (19 U.S.C. §1313), and its meaning had been settled by this Court well before 1918:

> "Whatever primary meaning may be indicated by its derivation, the word 'export' as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country. 'As the legal notion of emigrating is a going abroad with an intention of not returning, so that of exportation is a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country or other' [citation omitted]. *Swan & Finch Co.* v. *United States,* 190 U.S. 143, 144-45.

That definition has been followed consistently. *Thames & Mersey Insurance Co.* v. *United States,* 237 U.S. 19; *A. G. Spalding & Bros.* v. *Edwards,* 262 U.S. 66; *Richfield Oil Corp.* v. *State Board,* 329 U.S. 69.

Since the Webb-Pomerene Export Trade Act defines "export trade" in such clear and unmistakable terms, employing words in their ordinary sense which have a settled legal content, it is to be applied according to its plain meaning. *Helvering* v. *City Bank Co.,* 296 U.S. 85, 89; *Flora* v. *United States,* 357 U.S. 63, 69, 72, *aff'd on rehearing,* 362 U.S. 145; *United States* v. *Oregon,* 366 U.S. 643, 648. "There is nothing to construe." *Van Camp & Sons Company* v. *American Can Company,* 278 U.S. 245, 253. If the result of that plain meaning be thought unfortunate or mistaken by some, it is one "which Congress, having made, can refashion." *Unexcelled Chemical Corp.* v. *United States,* 345 U.S. 59, 66. See also *Palmer* v. *Massachusetts,* 308 U.S.

79, 83; *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79.

Appellant urges that Webb-Pomerene be read with little attention to its plain meaning and purports to perceive in this Court's decisions a principle that "exception[s] to the antitrust laws . . . are narrowly construed . . ." (GB 19). That principle, however, has no relevance to *express* exemptions from the Sherman Act, but only to those which are sought to be *implied* from a general statutory scheme. *Cf. United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-351, where the Court contrasted the lack of immunity conferred by the Bank Merger Act with "the express exemption provisions" of, among others, the Webb Act.

B. CPEA's AID-Financed Korean Transactions Were "Export Trade" as Defined by the Export Trade Act.

It is undisputed that the concentrated phosphates bid and sold by CPEA on the particular transactions challenged here were exported from the United States to the Republic of Korea: they were sold from Florida plants and loaded on ships in Florida seaports "for shipment to the Republic of Korea," procured by or for Korea, and finally used and totally consumed in Korea. (App. 42, 46, 48; Stip. 1, 14, 20). They had all the characteristics of exports: contract and shipping documents which in every instance made clear and unequivocal their foreign destination and the identity of the foreign consumer (App. 51, Stip. 26; App. 251-281); none of the goods sold was marketed or consumed in the United States, but all were shipped directly from producer to Korea (App. 46, 48, 51; Stip. 14, 20, 26).[23]

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[23] At one place in its brief (GB 21-22), the Government comes perilously close to suggesting that AID-financed exports may not be "trade or commerce" at all. If that were to be so, however, it would appear to follow that they are not "trade or commerce" for Sherman Act purposes either.

In all but two instances,[24] CPEA's bids were submitted directly to, and evaluated and determined by, the Korean purchasing agency, which itself awarded contracts, opened letters of credit, handled all disputes and negotiations relating to contract performance, assumed all contractual obligations of the buyer, took title and assumed risk of loss. (App. 53, Stip. 33-34; App. 189-200, 238-239, 251-254, 255, 273). In two instances when GSA acted as procurement agent for Korea, it was OSROK which initiated the transactions and specified the amount and type of phosphates to be purchased (App. 51-52, Stip. 28; App. 293-295), and GSA's handling of the procurement formalities was at Korea's request and on her authorization and behalf. (App. 102, ¶2; App. 51-52, Stip. 28; App. 293, 296) At all stages of these two transactions, it was established and recognized by all concerned that the commodities were destined for Korea and for export to OSROK. (Ex. 34, pp. 336-337; Ex. 35-36, pp. 339-359; Ex. 37, pp. 361-367; Ex. 39, p. 379)[25]

Appellant urges the Court to brush aside facts showing the clear export nature and substance of these transactions on the ground that, "Concepts of private contract law must give way before federal antitrust policy" (GB 24), citing *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 18 and *United States* v. *Masonite Corp.*, 316 U.S. 265, 276-277. The question in this case, however, does not turn on a clash between private contract and antitrust law, but on whether the pro-

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[24] Korea purchased a total of $48.1 million in concentrated phosphates from CPEA. According to the Government's calculations (GB 6-8), $40 million was handled directly by OSROK and $8 million was procured for Korea by GSA.

[25] Although GSA acted as procurement agency on these two transactions, OSROK took title and bore the risk of loss as AID's "designee." (App. 290; Ex. 37, pp. 364-367)

visions of the Export Trade Act "must give way" to a federal antitrust policy to which they are, and are intended to be, an express exception. Section 2 of the Webb Act is *intended* to permit acts to be done through joint associations which might otherwise be unreasonable restraints of trade in violation of the Sherman Act. See, S. REP. No. 1056, 64th Cong., 2d Sess. 2-3 (1917). To state the question in other terms, it is not whether—as in *Simpson* and *Masonite*—a questioned practice violates the Sherman Act; but whether the Sherman Act applies at all. This can be determined only by looking at the stipulated facts which show beyond dispute that defendants' concentrated phosphates were "exported" to Korea.

The fact that United States foreign aid funds were used by Korea would seem clearly immaterial to a determination of whether "export trade" were involved. As the Government itself concedes (GB 18), the Webb Act Congress recognized that export associations might sell to foreign customers using United States foreign aid loans and that the purchasing power of such funds might thereby be reduced. The Act nevertheless was passed; and any apprehensions that export associations might "frustrate" programs of foreign assistance were obviated many years later by the adoption of AID's comprehensive Regulation 1 to protect those programs against anti-competitive pricing and other burdens.

Nor is the alleged distinction between grants and loans of significance here—except to the extent that it emphasizes the importance of effective competition against foreign suppliers for grant-financed export business—since one of the Korean sales by CPEA which the Government does not challenge was financed by a special fund granted by the United States to Korea without even the supervisory effect

of AID's regulations. (App. 51; Stip. 25; GB 6, f.n. 5). The AID regulations themselves do not recognize any distinction between "grant" financing and "loan" financing.

AID undoubtedly had a special responsibility for the integrity and efficient use of the financial assistance it administered. That responsibility, however, was a financial one—"that of an investment banker"—and did not change the substance or the nature of export sales which were assisted by its dollar funds. *United States* v. *Standard Oil Co. of California*, 155 F.Supp. 121, 124-125 (S.D.N.Y. 1957), *aff'd*, 270 F.2d 50 (2d Cir. 1959).

AID's regulations and documents, and the statements of its officials, have invariably described the agency's role as "financing" and the transactions which it financed, such as those in issue here, as "exports."[28] It has been stipulated that AID did not purchase concentrated phosphates for Korea. (App. 49, Stip. 21 and, *e.g.*, App. 175, 180, §§ 201.10, 201.51). As Judge Ryan found at the conclusion of the proceedings below, "It is plain from the stipulated facts and from the very raison d'etre of the foreign aid program that the 'cooperating country' and not the United States is the purchaser" (273 F.Supp. at 271; App. 358). The basic economic theory of the foreign assistance program is to make

[28] In addition to the facts and materials already cited at pages 12 to 16, *supra*, see *Hearings on H.R. 15263 Before the House Committee on Foreign Affairs*, 90th Cong., 2d Sess., pt. I-VI (1968) in which AID officials regularly describe their agency's function as "financing exports" (*e.g.*, at page 198, "in fiscal year 1967, the AID program financed the export of $109 million worth of fertilizer.") At related hearings before the Senate Committee on Foreign Relations, AID's Administrator disclaimed responsibility for possible mis-use in the handling of AID-financed goods abroad on the ground that: "They are not our goods. We, like a bank, have financed the purchase of the goods, but they have been shipped by the American supplier to the Brazilian importer. . . ." *Hearings on S. 3091 Before the Senate Committee on Foreign Relations*, 90th Cong., 2d Sess., pt. 2 at 316 (1968).

purchasing power, in the form of foreign exchange costs, available to such nations as the Republic of Korea.

Even where, as in other types of transactions, the United States *is* the purchaser of goods certainly destined for shipment abroad, and even though no foreign consumer be involved, the purchase and sale is nevertheless an export for the purpose of determining whether a state sales tax may be applied. *Union Oil Co.* v. *City of Los Angeles*, 227 Cal. App. 2d 608, 38 Cal. Rep. 923, 926 (D. Ct. App. 1964), *cert. denied*, 379 U.S. 972.

Congress went to some lengths in the Export Trade Act to make clear that the exemption extended even to sales which were entirely consummated within the United States, so long as the ultimate foreign destination of the merchandise is certain. A preliminary version of the bill had provided that "'export trade' shall not be deemed to include . . . trading in or marketing within the United States. . ." 53 CONG. REC. 13706 (1916). At the urging of the Federal Trade Commission, "selling for consumption" was substituted for "trading in or marketing," the Senate Committee report pointing out:

> "We desire, of course, to authorize associations for the sole purpose of selling abroad. In order to do this, they must have the right to acquire or buy, within the United States, and *the right to sell within the United States for the foreign market*, but in view of the settled domestic policy of the United States under the Sherman law, clearly these associations should not be permitted to organize for the purpose of making sales abroad and use their organizations to sell for consumption within the United States." S. REP. No. 1056, 64th Cong., 2d Sess. 2 (1917), emphasis added.

Consequently, it has long been understood that an "export" for Webb Act purposes is, as in all other cases, a sale made with the certainty of a foreign destination." Accordingly, whether Korea was the purchaser, as Judge Ryan found, or whether the United States might be deemed the purchaser under some circumstances, as the Government contends, it is clear under the long-understood definition of "export" that the sale of goods to Korea by CPEA constituted "export trade" within the meaning of the Export Trade Act.

" The Webb-Pomerene immunity applies even to an export association whose principal business is in sales within the United States to other domestic concerns which perform the actual export function. See *Matter of Douglas Fir Exploitation and Export Co.*, FTC Dkt. No. 880, *dismissed*, 8 F.T.C. 526. The Chief of the Commission's Division of Export Trade testified in 1950 that, "Under the Webb Act it has always been assumed that all transactions within the United States which resulted in the movement of goods earmarked for export from a domestic point of origin to a port of exportation took place 'in the course of export trade,' even though such transactions were consummated between two American parties within the United States. This interpretation follows court decisions which have held that goods destined for exportation to a foreign country are in foreign commerce from the time of delivery to the carrier at an inland point." *Hearings on H.R. 6879 Before the Subcommittee on Monopoly Power of the House Judiciary Committee*, 81st Cong., 2d Sess., ser. 14, pt. 3 at 120 (1950). (Remarks of Allen C. Phelps).

POINT II

On the Agreed-Upon Facts of This Case It Is Evident That CPEA's Activities Furthered the Purposes of the Webb-Pomerene Export Trade Act and Were Consistent With Settled Practice and Understanding.

Congress designed the Export Trade Act, in the light of world trade circumstances not so very different from those which obtain today, as an instrument of policy to promote competition with foreign merchants and encourage expansion of American exports by permitting American producers to combine their activities in order to achieve economies of scale and greater competitive strength. CPEA's operations, world-wide and in Korea, served these purposes, observed both the letter and the spirit of the statute, and were in full accord with the long-settled understanding that foreign aid-financed export sales by export trade associations are entirely permissible.

A. Legislative History and Purpose

The Webb-Pomerene Export Trade Act became law at a time when Congress was as firmly committed to principles of free and fair competition as it is today. The Federal Trade Commission Act (38 Stat. 717) and Clayton Act (38 Stat. 730) had been adopted only two years before the bill was introduced; and the Wilson Tariff Act had recently been strengthened (37 Stat. 667). The Antidumping provisions of the Revenue Act of 1916 (39 Stat. 798) and the Shipping Act (39 Stat. 728) were fresh additions to the statute books.

Congress was at the time very much concerned with the country's role in world trade after World War I, when re-

vitalized European countries would likely resume their commanding positions in the world's export markets.[28] The demands of the domestic market overshadowed the opportunities of the export market for United States producers, and in the years immediately prior to World War I a substantial volume of world trade had been lost to other countries whose export efforts were more highly organized and less inhibited by the uncertainties of domestic antitrust policy.

The importance of the matter was such that the first Congressional assignment to the newly-created Federal Trade Commission was to undertake an investigation of export trade and to recommend a course of action to improve the competitive abilities of American companies in the coming struggle for overseas markets. The Commission promptly did so, and in 1916 submitted to Congress a comprehensive Report, the principal findings of which were,

> "(1) That other nations have marked advantages in foreign trade from superior facilities and more effective organizations.
>
> "(2) That doubt and fear as to legal restrictions prevent Americans from developing equally effective organizations for over-seas business and that the foreign trade of American manufacturers and producers, particularly the smaller concerns, suffers in consequence."[29]

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[28] See *e.g.*, exchange between Senators Pomerene and Cummins at 56 Cong. Rec. 70 (1917).

[29] Federal Trade Commission, Report on Cooperation in American Export Trade, 3 (1916).

As a possible solution to the problems it had identified, the Commission recommended legislation which, with appropriate safeguards, would permit American producers to combine their export marketing efforts so that ". . . . they can share the cost of developing new markets, establish themselves firmly, extend credit more readily to foreign customers, and compete more successfully with foreign syndicates and cartels." [30] A bill embodying the Commission's recommendations was introduced by Senator Pomerene and Congressman Webb and attracted the support of President Wilson and a number of industry representatives. After extensive consideration and amendment in the course of hearings and debates during 1916, 1917 and 1918, the present statute became law on April 10, 1918 as "An Act to Promote Export Trade and for Other Purposes." [31]

In view of the possible danger that combinations formed for export purposes might, if permitted, operate to restrain domestic competition, a focal point of the Congressional debates was the necessity of distinguishing in a clear and practical manner between domestic and export trade.[32] The distinction was finally drawn in a clear and concise definition using language ("export trade") with a settled meaning and in addition incorporating specific provisos to assure that export associations would not operate to the detriment of domestic competition. Proponents of the bill did "not see how it is possible to more accurately confine the bill

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[30] *Ibid.*, p. 8.

[31] See, TEMPORARY NATIONAL ECONOMIC COMMITTEE, INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER, Monograph No. 6, at 118-119 (1940).

[32] *E.g.*, 55 CONG. REC. 3570; 55 CONG. REC. 3580; 56 CONG. REC. 170; H. R. REP. No. 50, 65th Cong., 1st Sess. 2 (1916); S. REP. No. 109, 65th Cong., 1st Sess. (1917).

to purely export trade than is done in this . . . [definition]".[33]

The legislative history of the Export Trade Act is therefore clear that Congress intended to exempt export associations from the prohibitions of the Sherman Act, so long as they did not abuse their powers to restrain domestic trade. Congress established shipment abroad for foreign consumption as the test of "export trade."

It is equally clear that the 65th Congress was well aware of the likelihood that export associations would sell in export markets supported by the credit and the purchasing power of the United States. The Government concedes as much (GB 18), but then seeks refuge in the fact that the Korean transactions in suit here were financed by grants, while most foreign assistance in 1918 was characterized by loans. The significance of the difference is immaterial on the facts of this case, particularly so since the major portion of current foreign aid is on a loan basis (Agency for International Development, Facts about the Foreign Aid Program for FY 1968, at 13 (1967)) and since one of the concededly lawful Korean transactions was also financed by grant funds (App. 51; Stip. 25). In any event, the difference between loans and grants does not appear to have been viewed as a material one by the Congress which enacted the Webb Act. In debates over the appropriation of billions of dollars for foreign economic assistance in 1917-19,[34] and the issuance of bonds to support that program, considerable attention was given to the

[33] Remarks of Senator Kellogg, 56 CONG. REC. 111 (1917); Remarks of Senator Cummins, 56 CONG. REC. 173 (1917). It is stipulated here that defendants have not violated any of Webb-Pomerene's provisos. (App. 42, 45; Stip. 1, 12)

[34] See, 40 Stat. 35 (1917); 40 Stat. 288 (1917); 40 Stat. 502 (1918); 40 Stat. 1309 (1919).

question of whether such assistance should not be granted outright without any obligation to repay. Remarks of Senator Cummins, 55 CONG. REC. 757 (1917); Senator Kenyon, *id.* at 760; Mr. Moore, *id.* at 671; Mr. LaGuardia, *id.* at 676; Mr. Mondell, 56 CONG. REC. 4337 (1918); Messrs. Sloan and Moore, 57 CONG. REC. 4282 (1919). While this view did not prevail at the time,[35] there were few illusions as to the strength of the receivables created by foreign assistance loans, and it was recognized that a paramount interest should be to utilize the credit extended abroad to stimulate American exports and thus retain the dollars loaned in the United States to the greatest extent possible.[36]

B. CPEA has Competed in World Markets, Including Korea, in the Spirit and According to the Letter, of the Export Trade Act

It cannot be doubted on this record that CPEA served as an effective instrument for carrying out the Webb Act's design of encouraging competitive expansion of American export trade through combination and cooperation in making export sales. The association was actively engaged in substantial, world-wide competition with a number of powerful foreign suppliers, some of them affiliated and some of them partly owned or controlled by foreign governments (App. 59-60; Stip. 40-41). In the face of such competition, the cooperative endeavors made possible by CPEA's organi-

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[35] The decision at the time to extend economic assistance on a "loan" basis was at least partly due to a consideration for the national "pride" of recipient nations. The government of France went so far as to request that a bill for grant aid to that country not even be debated by Congress. BROWN & OPIE, AMERICAN FOREIGN ASSISTANCE, The Brookings Institution 2 (1953).

[36] Remarks of Senator Thomas, 55 CONG. REC. 753 (1917), and Senator Stone, *id.* at 7121.

zation and operation succeeded, in a span of about six years, in marketing American-produced fertilizer chemicals in thirty-nine foreign countries. (App. 45-46, Stip. 13). The lawfulness of the vast majority of those sales in number, accounting for about 50% of CPEA's volume, is not disputed. (App. 42, 45, 46, 54; Stip. 1, 12, 13, 35-36)

CPEA was an active, going concern, and not simply a vehicle for the setting of prices and allocation of business. It promoted its products, developed markets, negotiated and made sales, and generally attempted to and did sell American phosphates wherever demand existed or could be created. (App. 42-43, 45-46, 52-53, Stip. 2, 13, 30-32). If such an organization is to operate successfully, the legality of its efforts to penetrate foreign markets cannot be made dependent on such uncertain and temporary circumstances as the presence and terms of United States foreign assistance in particular markets where demand exists.

CPEA's efforts in making Korean sales were similarly consistent with the spirit, purposes and requirements of the Webb-Pomerene Export Trade Act. Those efforts were wholly unrelated to, and are not claimed to have had any effect upon, domestic trade.[37] The export character of the transactions is most clearly reflected in the stipulations that "AID did not itself procure any concentrated phosphates" and, in a paraphrase of one of the Webb Act's provisos, that "foreign aid funds have not been used to procure commodities for use or resale in the United States." (App. 48, 49, Stip. 20, 21) It has always been evident—

[37] The Webb-Pomerene Congress, however, recognized and accepted that, "any sales in foreign commerce may incidentally and temporarily result in the increase in prices of the same articles to home consumers . . ." S. Rep. 1056, 64th Cong., 2d Sess. 3 (1917). This belies the Government's argument that Congress contemplated the effects of an export association's activities would be "exclusively in foreign markets and upon goods sold abroad" (GB 22).

to defendants, the Federal Trade Commission, AID, GSA and the Korean government—that, by any standard or custom of the trade, defendants were engaged in export trade when they sold concentrated phosphates to Korea. All the evidence in the record is consistent with that view. Questions of financing aside, the Korean transactions were precisely the type of trade which the Webb Act was fashioned to encourage: shipments to foreign countries of goods produced in the United States.

Moreover, as the stipulation of facts makes clear, CPEA's principal involvement on the transactions in question was directly in and with Korea. Its representatives were active in that country to promote phosphates directly to farmers, agricultural schools and procurement agencies; to consult with Korean government officials and agricultural experts about fertilizer use and to gather information about the market; to make the actual sale by preparing and submitting competitive bids, posting performance bonds, and attending bid openings; and to arrange shipping schedules, supervise unloading and, if necessary, handle disputes over contract performance and terms. (App. 52-53, Stip. 30-32).

In short, the association's efforts in Korea contributed in an important fashion to the establishment of a permanent market position for American commodities and stimulation of long-term demand for them; and that is what Webb-Pomerene is all about. AID's own activities, essentially financial in nature, did not supplant the need for, or the importance of, CPEA's Korean operations. It is stipulated here that Korean agencies decided which types, grades and concentrations of phosphate fertilizers should be procured by that country (App. 53, Stip. 34), so that CPEA's market-development activities were essential to maintain a place in Korea's planning for its products.

Moreover, and of critical importance to the ultimate issue in this case, are the facts showing the presence of substantial foreign competition for Korea's AID-financed business. (App. 53, 59-60, Stip. 34, 40; App. 327-340) Where such competition exists, particularly in markets financed by dollar credits, there is surely the kind of export trade directly contemplated by the sponsors of the Export Trade Act whose primary purpose was to encourage more effective competitive efforts against foreign traders through cooperation among American exporters.

Thus, CPEA was carrying on normal export business with Korea, as an integral part of its world-wide operations, in a manner completely consistent with the intent and requirements of the Export Trade Act; and its activities in Korea concretely affirm the existence of export market problems which concerned the 65th Congress. American producers were for the most part preoccupied with the domestic market, and the planning, continuity and stimulus of an association solely devoted to export trade was necessary to turn their attention abroad in an organized fashion. To market phosphates in Korea against substantial foreign competition, the economies achievable through a cooperative enterprise were necessary to overcome the disadvantages of a product which was new to the market and of costly long-distance shipping of bulk materials to a market in which purchasing decisions were not made in a freely competitive manner.[25] Cost efficiencies were critical to success under these circumstances, and duplicate marketing facilities on any significant scale were not feasible, particularly since future demand for American-produced phosphates would be substantially affected by the construction

[25] Report to Congress by the Controller General of the United States, *Examination of Economic and Technical Assistance Program for Korea*, (FY 1957-1961), pp. 84-87, 95, 98, 107-111.

of new fertilizer plants in Korea, two of them financed by AID (App. 61, Stip. 43). The Government's assertion (GB 17) that the "raison d'etre of the Webb-Pomerene Act has no applicability to transactions which are paid for by the United States" seems palpably illogical, and inconsistent with the legislative history and purposes of the Act, when one takes into proper account the presence here of foreign competitors whose Korean sales were also financed by AID grants. Indeed, the "raison d'etre" of Webb-Pomerene is peculiarly applicable on the facts of this case in order to encourage the effective competition of American producers so that the grant dollars might remain in this country rather than becoming a part of the gold outflow to foreign nations.

CPEA's efforts—world-wide and in Korea—have played a large part in encouraging exports of American phosphates and consequently have been completely consistent with the public purpose embodied in the Export Trade Act.

C. Long-Standing Practice Confirms That CPEA's AID-Financed Export Sales Were Export Trade Within the Webb-Pomerene Export Trade Act

Since their very beginnings, export associations operating within the exemption of the Webb Act have sold their products abroad under various United States foreign assistance programs, and from time to time have been encouraged by Government agencies to do so. Indeed, some of the first such associations "were organized for the purpose of selling goods to the Allies during the World War." [39]

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[39] TEMPORARY NATIONAL ECONOMIC COMMISSION, INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER, Monograph No. 6, at 133 (1940). The same monograph notes (at page 146) that export associations were used "also for the disposition of surplus war stocks after the armistice."

One of the first known Webb-Pomerene groups, the Millers Export Association, was organized in 1918 and, until some time in 1920, acted as agent for United States producers of foodstuffs in selling to Allied countries through the Food Administration Grain Corporation and its successor, the U.S. Grain Corporation, both Government agencies.[40] This foreign assistance program had been authorized by Congress in 1917 and implemented by executive order in the same year. During the debates on Webb-Pomerene it was recognized that grain producers would likely organize an export association to take advantage of the program.[41]

The Grain Corporation acted as a central selling agency, among other things, for grain procured by Allied governments, and it controlled all exports of the commodities with which it was concerned. Later, after the armistice, it expanded its operations and was responsible for the distribution of foodstuffs in relief of Europe. It has been reported that the Grain Corporation distributed or sold abroad about $3.3 billion of American foodstuffs, and that, of the total, $2.4 billion was sold on credit, about $325 million was given away as charity, and the balance paid for in goods, gold or services. The financing of these exports was, of course, a critical problem, and it was solved by the extension of American credit—in the form of grants, as well as loans (40 Stat. 1161 (1919)).[42]

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[40] FEDERAL TRADE COMMISSION, FOREIGN TRADE SERIES No. 2, pp. 6-7 (1935); FEDERAL TRADE COMMISSION, REPORT ON COMMERCIAL WHEAT FLOUR MILLING, 41 (1920).

[41] See Remarks at 55 CONG. REC. 2788-2789 (1917).

[42] SURFACE, THE GRAIN TRADE DURING THE WORLD WAR, Macmillan Co., 169, 398-442 (1928); SURFACE & BLAND, AMERICAN FOOD IN THE WORLD WAR AND RECONSTRUCTION PERIOD, Stanford Univ. Press, 15-21, 31-50, 73-88, 113-116 (1931); BANE & LUTZ, ORGANIZATION OF AMERICAN RELIEF IN EUROPE, 1918-1919, Stanford Univ. Press, 1-6, 10 (1943).

In more recent times, export associations sold under World War II Lend-Lease programs, in which procurement was handled by the United States Treasury Department. (App. 52, Stip. 29; see, *Matter of Carbon Black Export, Inc.*, 46 F.T.C. 1244, 1390-91 (1949)).

Following World War II, Webb associations continued to be active in making export sales, and the Federal Trade Commission's 1950 Annual Report, in describing the activities of export associations, noted that some sales were directly attributable to the use of U.S. foreign aid financing to offset the loss of purchasing power resulting from a dollar shortage and devaluation of foreign currencies. The Motion Picture Export Association sent films abroad under the Marshall Plan (ECA) and was paid in dollars, by ECA for its exports to Germany and by the United States Army for Japan.[43] Indeed, ECA actively encouraged association under the Export Trade Act as an efficient way of developing sales to the export markets it financed.[44]

When ICA (AID's immediate predecessor) succeeded ECA, export associations continued to make sales financed by the United States, and continued to be encouraged to do so. (App. 52, Stip. 29). ICA, which was sensitive to considerations of antitrust policy when applicable,[45] published and circulated a "Small Business Memo" which extolled the advantages of export associations as one method for participating in ICA-financed export sales (App. 318-325). The document points out that,

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[43] *Hearings on H.R. 6679 Before the Subcommittee on Monopoly Power of the House Judiciary Committee*, 81st Cong., 1st Sess., ser. 14, part 2A, at 660 (1949).

[44] *Ibid.*, Part 3, at 141-142.

[45] BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD, McGraw-Hill, 459-473 (1958).

> "The associations operating under this law [Webb Act] have achieved many advantages in their efforts to build up a profitable export trade, among which are agreements upon price and terms of sale to foreign buyers, the centralizing of sales efforts or the setting up of a joint sales organization, thus making possible economies in sales costs, . . ." etc. (App. 320-321).

This Memo evidently continued to be circulated by AID, at least until the change in regulations late in 1966. Webb-Pomerene associations other than CPEA are currently making export sales under the foreign aid program,[46] as well as under the administration of Public Law 480, in which United States funds are used to finance the export of agricultural products. (App. 52, Stip. 29).

Turning finally to the Korean assistance program, and to the particular transactions in suit, it is stipulated that officials of AID, GSA and OSROK were at all times aware of CPEA's status as an export association and yet invited the association to compete on each of those transactions. (App. 53, Stip. 33). Moreover, the Federal Trade Commission was fully advised of all CPEA activities, including its AID-financed sales. (App. 45, Stip. 12).[47]

Under these circumstances, where responsible and concerned Government agencies have over a considerable pe-

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[46] This despite the fact that AID holds itself out as possessing the power to disqualify export associations from making AID-financed sales, where it is thought appropriate to do so. 31 Fed. Reg. 14079 (November 3, 1966) and 16693 (December 30, 1966).

[47] The Commission has recently re-evaluated the Webb-Pomerene Act and has recommended certain modifications and clarifications. Its report is notably silent on the question of whether any change should be made to deal with foreign aid-financed sales by export trade associations. THE FEDERAL TRADE COMMISSION, ECONOMIC REPORT ON WEBB-POMERENE ASSOCIATIONS 67-70 (1967).

riod of time permitted, and in fact encouraged, the very practices now under attack, there is the persuasive evidence of usage that the purposes and limitations which appellant now seeks to attribute to the Export Trade Act are lacking in any real substance. *Inland Waterways Corp.* v. *Young*, 309 U.S. 517, 524-525; *Zemel* v. *Rusk*, 381 U.S. 1; *United States* v. *Cooper Corp.*, 312 U.S. 600.[48]

If, in fact, Congress had not intended the Webb Act to have its plain meaning, as confirmed by fifty years of administrative practice and industry understanding, it would have been an easy matter for it to seize upon its many opportunities to set the matter straight. It has long been aware (pages 40, 46-47, *supra*) that export associations have regularly sold in the foreign aid program, and yet has repeatedly emphasized its wish that such program "shall, to the maximum extent consistent with the accomplishment of the purposes of this title, utilize private channels of trade." Economic Cooperation Act of 1948, §112(h) (62 Stat. 137, 148). Congress has reviewed the foreign aid program annually and, on a number of occasions over the years, has reviewed the Webb Act in hearings at which Department of Justice spokesmen regularly recommend its amendment or outright repeal.[49]

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[48] In an earlier case involving one of AID's predecessors, the Second Circuit Court of Appeals noted that, ". . . the best interpretation of the mutual contemporaneous understanding of the parties under which the defendants made and ECA financed crude oil sales is to be found in their words and their acts." *United States* v. *Standard Oil Co. of California*, 155 F.Supp. 121 (S.D.N.Y.), *aff'd*, 270 F.2d 50, 58 (2d Cir. 1959).

[49] See, *e.g.*, *Hearings on H.R. 6679 Before the Antitrust and Monopoly Subcommittee of the Senate Committee on the Judiciary*, 81st Cong., 2nd Sess., ser. 14, pt. 3, at 172-188 (1950); *Hearings Pursuant to S. Res. 26 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. 126 (1967).

D. Appellant's Labored Interpretation of the Export Trade Act Would Introduce Uncertainty and Confusion to an Area Where Congress Intended None to Exist

An important purpose of the Export Trade Act was to remove doubt and uncertainty as to whether, and, if so, to what extent, the Sherman Act's prohibitions applied to cooperative export selling efforts among American producers. H.R. Rep. No. 50, 65th Cong., 1st Sess., 2 (1917). In its grant of immunity to such efforts, Congress spelled out a clear and definite qualifying test by the plain meaning of its definition of export trade.[50]

Appellant's artificial construction of the statute—which is in any event unrelated to the facts—would defeat that purpose. While the Government argues at some length from theoretical and policy considerations that CPEA's Korean sales were not "export trade," it never really comes to grips with the problem of determining what else those sales might be.[51] Nor is the Government at all precise as to the substance and meaning of the tests it would apply to this matter.

The distinction between grants and loans cannot be determinative, for the Stabilization Fund purchase, which is

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[50] "The export trade of the United States is the foreign trade of the United States. To export commodities means to sell them and transport them to some other country in the world. That is our foreign trade, and this bill nullifies the antitrust laws so far as export trade is concerned." Remarks of Senator Cummins, 56 Cong. Rec. 173 (1918).

[51] Since the commodities sold were shipped directly from Florida plants to Korea, they must be viewed as "trade or commerce . . . with foreign nations" for the Sherman Act to have any applicability here at all. (It is stipulated that the goods were not sold for use, consumption or resale in the United States. App. 48, Stip. 20). At least as a matter of logical analysis, it would seem to follow from the very grounds on which the Government asserts a cause of action that CPEA's sales necessarily fall within Webb-Pomerene's definition of "export trade."

conceded to have been a lawful transaction, was also based on a grant of economic assistance. Moreover, the determination of whether foreign aid is to be granted or loaned is one made by the governments involved, is generally not disclosed to American exporters, and in any event the aid extended to a particular country, including Korea, is normally a mixed "package" of grants and loans.

Nor is the fact of AID financing, coupled with AID regulation, the test sought to be applied. It is stipulated that CPEA sold to AID-financed customers other than Korea in transactions subject to AID regulations (App. 54, Stip. 36), but the Government does not now dispute the legality of those sales. (App. 42, 45, Stip. 1, 12)[52]

Congress has provided a plain and precise test for the Export Trade Act exemption, and CPEA has plainly met it. If the Government believes that a change is desirable, its recourse is to Congress.[53]

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[52] The Government cannot now alter its stipulations and concessions to fit the theories it intends to advance. Stipulations are favored by the courts, *National Labor Relations Board* v. *J. L. Hudson Co.*, 135 F.2d 380, 384 (6th Cir.), *cert. denied*, 320 U.S. 740; and grounds advanced for the first time in this Court will not be considered when they "are not open on the record," *Delgadillo* v. *Carmichael*, 332 U.S. 388, 391. At the same time, all legitimate inferences may be drawn from an agreed statement of facts, and considered, since they are in legal effect a part of the facts agreed. *Federal Trade Comm'n* v. *Pacific States Paper Trade Ass'n*, 273 U.S. 52, 61.

[53] In view of ". . . the new American stake in world resources and the world's standard of living . . . the encouragement of foreign business [is] a matter of public as well as purely private importance. As in any area where stimulation of useful private activity is in the public interest, it is important to confine the shadows of legal risk as closely as possible to the substance of the harms sought to be prohibited, lest the useful be deterred along with the harmful." BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD, McGraw-Hill, 11 (1958).

POINT III

Appellant's "Burden" Theory Is Not Supported by the Record and Is Contrary to the Law and the Stipulated Facts.

A consistent theme of appellant's brief (GB. 13, 14, 19, 24) suggests that CPEA's Korean sales activities somehow "burdened" the foreign aid program and the American economy. This stipulated record, however, cannot support the argument as a matter of fact;[54] and, as a matter of law, the government's position, as the District Court observed, is "ingenious" but *"a posteriori."* (App. 348, 360).

Indeed, the argument is surprising in a way, since government counsel in the proceedings below candidly informed the court that no charge was made of unreasonable or discriminatory pricing by the defendants. (App. 342-345).

A. There Was in Fact No Burden, and the Record Contains No Evidence of Any Unreasonable Restraints Resulting From CPEA's Operations

Korea's AID-financed purchases of concentrated phosphates were made in a competitive market and at competi-

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[54] Whether the activities of export associations may burden or advance the United States Foreign Assistance program is a question of policy and of economic consequence which is an inappropriate basis for litigation, particularly when the record of the case is as limited as it is here. Indeed, the government's failure to present direct evidence of any burden *in fact,* coupled with the concession that CPEA had no effect on domestic commerce, may well give rise to an inference that no such evidence exists, 2 Wigmore § 285. If the "burden" theory were thought to have some substance as an appropriate question of fact, the case should be returned to the district court for the taking of evidence on the point, *Willing* v. *Bienstock,* 302 U.S. 272, or referred for investigation and consideration to the Federal Trade Commission (see, 15 U.S.C. § 46(h)), which has special responsibilities and expertise in this area.

tive prices. A total of twenty domestic, and ten foreign, competitors submitted bids for the business, and on every occasion Korea had alternative sources of supply from which to choose. Prices appear to have been freely competitive, with a general trend downwards, and CPEA's own bids were invariably in the lower range of tenders. (App. 327-340).

CPEA's many competitors were substantial concerns. To the extent that the association was able to offer larger tonnages than other suppliers, the inference is plain that export cooperation and organization served as the pro-competitive export stimulus which Congress intended it to be.[55] Indeed, the success of CPEA's initial efforts in developing and supplying Korean demand for phosphate fertilizers appears to have induced greater competitive activities by other suppliers. In 1961 and 1962, only three American producers of concentrated phosphates competed with CPEA on Korean procurements, and their total offers amounted to only 59,000 tons. During the same period, six foreign suppliers offered 50,000 tons of high-grade, and a far larger quantity of low-grade, fertilizers. (App. 327-330). Beginning in 1963, however, twelve "new" American producers, and at least five foreign sellers, joined the competition, and the total of offers to sell substantially exceeded Korea's requirements. (App. 331-340).[56]

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[55] The sporadic sallies which other American phosphate producers comparable in size to the defendants made in the Korean market indicate the likelihood that, if there had been no CPEA, American participation as a supplier to that market would have been greatly diminished and there might well have been a general supply shortage at particular times. (App. 327-340).

[56] The record suggests that phosphates may have been in relatively short supply during the early part of the period involved in this case. Diammonium phosphates, first developed in 1959, were not available in commercial quantities until 1962 and were not purchased by Korea until 1964 (App. 44, Stip. 9; App. 333).

Read as a whole, the stipulated record is convincing evidence that CPEA's activities burdened no one. It is conceded that the association observed the "competitive market price" test laid down by the AID regulations (App. 183, § 201.63; App. 342-344), that it neither restrained the export trade of any domestic competitor nor artificially affected domestic prices (App. 42, 45, Stip. 1, 12), and that its activities in Korea supplemented the efforts of AID and Korean officials to increase the productivity of Korea's agriculture through more effective use of fertilizers (App. 53, Stip. 32).

It is reasonable to assume that, because of economies of scale, CPEA's selling costs were lower than those of the individual companies would have been, so that it is impossible on this record to draw any inferences as to the prices which its members might have offered as individuals during the same period of time. Costs of customer contact, market development, bid preparation and contract administration, as well as shipping costs, were proportionately less on a shared basis.

Appellant relies heavily here on the close supervision which AID is said to have exercised over these transactions, and on the comprehensive nature of the AID regulations. But those are factors which are themselves persuasive evidence that the government's position is theoretical only. The regulations provide that AID will not finance a transaction at a price higher than "the market price prevailing in comparable export sales in the United States" or "in comparable domestic sales in the United States." If it had really been thought that CPEA's sales were a "burden" on the foreign assistance program, AID, as the District Court found, "was not without remedy or means to dis-

courage or stop such activities" (App. 365) pursuant to its regulatory control.[57]

B. Nor Was There Any "Burden" in Law

The heart of appellant's theoretical argument is found in the assertion that "under familiar principles of construction designed to preserve the national policy in favor of competition, . . . the Webb-Pomerene Act must be closely confined within the scope of its intended purpose" (GB. 13-14). On the assumption that the "national policy of competition" applies here, it is then concluded that CPEA's activities have deprived the foreign assistance program of "the benefits of competition" *among the association's members* and are in conflict with the policy of that program (GB. 24).

The argument proceeds from the results desired and is based on invalid premises. The only question is whether the Sherman Act applies at all, and that is to be determined from an examination of the facts indicating whether the defendants were engaged in "export trade."

Cooperative export associations, particularly CPEA, stimulate rather than suppress competition for export sales by assisting American producers to be more effective in meeting foreign suppliers in the struggle for position in world trade. The essential "restraint" which the Export

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[57] As already noted, AID acted in part in late 1966 to amend its regulations to bar export associations from bidding on "U.S.-source only" transactions which it was asked to finance, 22 C.F.R. 201.52 (a)(7) (1968). Point II of the Government's brief (pp. 26-28) wholly misconceives the significance to this case of the AID regulations. It has never been suggested, either by defendants or by the district court, that those regulations might give rise to any kind of antitrust exemption. The exemption stems solely from the Webb Act. The regulations do, however, demonstrate the contrived nature of appellant's "burden" argument, as Judge Ryan pointed out.

Trade Act permits is the elimination of export competition among individual producers who form a cooperative association under proper auspices; but once the association has been so organized and takes on existence as a separate entity, it is itself fully subject to the antitrust laws in the conduct of its business and may not combine or conspire with *its* competitors in restraint of the foreign trade or commerce of the United States. *United States Alkali Export Ass'n Inc.* v. *United States,* 325 U.S. 196.[58]

This was the instrument chosen by Congress to carry out the "national competitive policy" in the struggle for export markets. It should apply *a fortiori* where, as here, the competitive foreign market is financed by foreign assistance grant funds, with the consequence that each success by a foreign bidder added to the debit side of America's balance of payments.[59]

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[58] The government's district court brief in *Alkali Export* noted that Webb-Pomerene was adopted "to enable co-operative groups to function in export trade with the same freedom as that exercised by a single individual or corporation." Brief for the United States, *United States* v. *Alkali Export Ass'n,* Civ. 24-464 (S.D.N.Y.) filed June, 1944, at p. 40.

[59] If export associations are to be permitted and encouraged to bid in foreign markets financed by AID *loans,* (GB. 18), no good reason is perceivable why they should not be encouraged to do so in foreign markets which are financed by *grants* available to pay for purchases made from foreign, as well as American, suppliers. The "burden," if any, which arises from these transactions arises from the *fact* of the grants, and not from the use to which they are put, except that an additional "burden" is created when the foreign supplier is successful in competing for the available business. When CPEA succeeded, on the other hand, the burden was reduced, for the dollars remained in this country's economy. Moreover, the counterpart funds which were created in Korea as a result of these transactions represented a major return to the United States, which, as the district court found, "may well be incalculable and far exceed measurement in dollar and cents standards." (App. 361) But for those funds, which went to support Korea's Army, in Korea and Vietnam, and for other foreign assistance purposes, it may be assumed that there would have been a further call on the taxpayer's dollar for aid funds.

The selection of a cooperative organization as an instrument for carrying out a policy of effective competition is not the aberration appellant presumes. An express Congressional intent to grant exemptions from the antitrust laws has been manifested in a wide range of important commercial areas, and it is estimated that 18.4% of our national income now originates in such exempt areas. KAYSEN and TURNER, ANTITRUST POLICY 42 (1959). Typical of such exemptions in the domestic market are Section 6 of the Clayton Act, 15 U.S.C. § 17, and the Capper-Volstead Act, 7 U.S.C. §§ 291, 292.[60]

A Congressional policy of pro-competitive exemptions is particularly marked in the area of foreign trade and commerce. Aside from the Webb Act, other important manifestations of the policy are the Shipping Act, 46 U. S. C. §§ 813(a), 814; the Merchant Marine Act of 1920, 46 U.S.C. § 885(b); the Balance of Payments Antitrust Exemption Act of 1965, 31 U.S.C. § 932(c); and the Fisheries Cooperative Act of 1934, 15 U.S.C. §§ 521, 522. While each of these statutes serves a distinct objective, the policy of assisting American business to compete for foreign trade is common to all.[61]

Since the exemption provided by the Webb-Pomerene Act is both explicit and closely related to consistent policy

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[60] See, also, Section 708 of the Defense Production Act, 50 U.S.C. § 2158(b); and the Small Business Act, 15 U.S.C. § 640(b).

[61] See, *e.g.*, S. REP. No. 860, 87th Cong., 1st Sess., p. 5 (1961) accompanying amendments to the Shipping Act: "Since most carriers cannot operate as cheaply as some competitor which possesses national cost advantages, the conference affords a device whereby all carriers, working as a group, set rates at a point where such an advantage is not absolutely controlling." A logical corollary to appellant's position in this case would be that the members of a shipping conference lose the antitrust exemption when they transport AID-financed commodities, at AID-financed rates, from the United States abroad.

in the foreign trade area, there is no basis for urging that it be narrowly construed. Nor is a different result justified by appellant's references to a policy of competitive bidding,[62] since on the facts here it is plain that CPEA bid in active competition with a number of substantial suppliers, and it is conceded that the Korean procurements were at reasonable and competitive prices.

Appellant's recourse to *per se* principles of antitrust illegality (GB 24) is entirely inappropriate in testing the scope of an antitrust exemption which expressly precludes the application of those principles to the trade exempted, and where, moreover, the basis of the government's argument is injury to the buyer (as it sees the case) and not injury to competition. Cf. *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 6. Appellant's reasoning here flatly contradicts the entire purpose and theory of Webb-Pomerene: to permit combination and cooperation in export trade in order to further competition for world markets. To the extent that such combinations may operate to the direct disadvantage of domestic buyers, the statute contains an express, protective proviso,[63] but appellant has stipulated that CPEA has not had that effect and may not now take an inconsistent position.

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[62] We are aware of no similar instance in which it has been suggested that otherwise exempt associations may lose that exemption when dealing with the government. Government agencies presumably purchase goods sold by agricultural cooperatives and patronize shipping lines which are conference members. See, *Antitrust Exemptions*, 33 A.B.A. ANTITRUST L.J. at 24, n. 28 (1967).

[63] "*Provided:* That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein." 15 U.S.C. § 62.

Appellant's case here is much like that which it brought to this Court in *McLean Trucking Co.* v. *United States*, 321 U.S. 67, and should be disposed of in the same manner:

> "On its face the contention would seem to run in the teeth of the language and the purpose of Section 5(11). Nothing in its terms indicates an intention to create one authority for rail consolidations and another for motor mergers. Identical provisions govern both. And to restrict the application of the section to motor carriers in the manner urged would nullify its operations as to them. The attack, when carried to such an extent, comes down to one upon the policy which Congress has declared. It has done so in terms which do not admit of nullification by reference to the varying conditions under which different types of carriers were brought within the statute's operation. It is not for this court, or any other, to over-ride a policy, or an exemption from one, so clearly and specifically declared by Congress, whatever may be our views of the wisdom of its action." 321 U.S. at 78-79

Conclusion

For all of the foregoing reasons, the judgment below should be affirmed or, in the alternative, the case remanded with instructions to vacate the judgment below and to enter an order of dismissal for mootness.

Respectfully submitted,

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TABLE I

PURCHASE, SUPPLY AND FINANCING RESPONSIBILITIES
IN KOREAN AID-FINANCED PURCHASES OF CONCENTRATED PHOSPHATES

	Republic of Korea	Suppliers	United States
Basic Agreements	Korea signs Mutual Defense and Assistance treaties with U.S.		U.S. signs Mutual Defense and Assistance treaties with Korea.
Korean Import Program	Korean agencies estimate import needs; decide types and concentrations of fertilizer to buy.	CPEA promotes and advertises products in Korea to increase demand for concentrated phosphates.	AID reviews Korean estimates; recommends total aid program to Congress, which appropriates funds.
Financing	Korea asks AID to finance specific commodity purchases.		AID agrees to finance from funds it has allocated for Korea.
Purchasing*			
(1) Announcement	OSROK sets terms and conditions, and solicits bids from suppliers; gives notice to AID.	Receive invitation to bid from OSROK and announcement from AID.	
(2) Bidding	OSROK receives and evaluates bids in Korea.	Submit bids to OSROK in Korea; certify to OSROK and AID that bid price not above "comparable export price."	AID reviews documents.
(3) Purchase Contract	OSROK awards contracts; submits bid abstract to AID 20 days after tender; Bank of Korea opens letter of credit through Schroder Bank (U.S.).	Execute contract with OSROK; post performance bond with OSROK; responsible to OSROK for any default.	
(4) Shipment	OSROK arranges shipping and insurance; notices shippers to load; inspects material (samples sent to Korea).	Ship at OSROK's call, responsible to OSROK for demurrage and other charges.	
(5) Payment	Bank of Korea instructs Schroder Bank to make payments; pays Schroder Bank's fee, and pays for non-U.S. flag shipping.	Receive payment from Schroder Bank against shipping documents.	AID pays Schroder Bank against voucher and supplier's shipping documents.
(6) Default	OSROK holds supplier liable for default; is liable to AID, if AID regulations not met.	Liable for non-performance to OSROK.	Can seek refund from OSROK if regulations not met or act against supplier if price regulations not met.
Sale to Consumer	Korean agency sells to consumers; deposits counterpart funds.		U.S. determines use of counterpart funds.

* GSA handled two purchases for OSROK, with Korea's approval and on its instructions for shipping, etc.